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No. 99-77

In The

Supreme Court of the United States

EXZAVIOUS LEE GIBSON,

Petitioner,

v.

FREDRICK J. HEAD, Warden, Georgia Diagnostic and Classification Center,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE
QUESTION PRESENTED

Should this Court decline to grant certiorari to review a death row inmate's case where:

(1) the inmate filed his habeas corpus petition, after waiting almost four years from the time his conviction became final and with no execution order outstanding, in a maneuver designed to avoid new capital state habeas corpus timelines,

(2) the habeas corpus petition was prepared by the state-funded Resource Center,

(3) the Resource Center filed motions in the habeas corpus court on behalf of the inmate,

(4) the Resource Center nevertheless refused the habeas corpus court's requests to enter a formal appearance as the inmate's counsel,

(5) every death row inmate in the state both before and since Petitioner has been represented in state habeas corpus by the Resource Center, defender organizations, or pro bono counsel; and

it is therefore obvious that the inmate's "right to counsel" claim was contrived by the Resource Center?

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STATEMENT OF THE CASE

Due to the factually inaccurate and misleading nature of Petitioner's Question Presented and Statement of the Case, an understanding of the true procedural history of this case is critical to this Court's determination whether this case warrants the exercise of its certiorari jurisdiction.

This case does not involve a "borderline mentally retarded" death row inmate, a death row inmate forced to file a habeas corpus petition without the assistance of counsel, or habeas corpus proceedings which were the inmate's "only opportunity to prove fundamental constitutional claims."

To the contrary, this case involves a death row inmate who, after waiting four years from the time his conviction became final and with no execution order outstanding, contrived to file a habeas corpus petition prepared by the state-funded Resource Center in a maneuver designed to circumvent new capital habeas corpus timelines.

The procedural history of this case is as follows:

Petitioner, Exzavious Lee Gibson, was tried June 11 through June 14, 1990 for the malice murder and armed robbery of Douglas Coley.[1] The jury convicted Petitioner

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[1] The Supreme Court of Georgia on direct appeal found that Petitioner had stabbed, slashed or cut the victim some thirty-nine (39) times with such force that he broke the knife blade in the victim's neck. Petitioner then robbed the victim of almost $500 in store receipts and the victim's personal wallet as the victim operated his family-owned grocery store. Petitioner first told police he had killed the victim to get money for drugs.

of malice murder and armed robbery. Following the sentencing phase of trial, the jury found the existence of two statutory aggravating circumstances: that the murder was committed while Petitioner was engaged in the commission of the capital felony of armed robbery pursuant to O.C.G.A. § 17-10-30(b)(2) and that the offense of murder was outrageously or wantonly vile, horrible, and inhuman in that it involved aggravated battery to the victim pursuant to O.C.G.A. § 17-10-30(b)(7). The jury returned a death sentence against Petitioner, and Petitioner was sentenced to death for malice murder. Petitioner received a sentence of life imprisonment for armed robbery.

Petitioner's motion for new trial was denied on January 4, 1991. Thereafter, Petitioner appealed to the Supreme Court of Georgia, which affirmed his convictions and sentences on June 10, 1991. *Gibson v. State*, 261 Ga. 313, 404 S.E.2d 781 (1991). This Court denied certiorari on February 24, 1992. *Gibson v. Georgia*, 502 U.S. 1101 (1992), *reh'g denied*, 503 U.S. 999 (1992).

Almost four years later, on December 20, 1995, with no execution date pending and in the absence of any prompting by the State, Petitioner voluntarily filed a state habeas corpus petition which had been prepared by the Georgia Appellate Practice and Educational Resource

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In a second statement, Petitioner claimed that the victim had lectured him about his behavior and use of profanity during an earlier visit by Petitioner to the store on the day of the murder, and that Petitioner wanted to "hurt" the victim because he "didn't like him." *Gibson v. State*, 261 Ga. 313, 313-314, 404 S.E.2d 781, 783-784 (1991).

Center (hereinafter the "Resource Center") on Petitioner's behalf. (App. at 1). Petitioner, through counsel, later admitted, "The purpose of filing [December 20,] 1995 was to avoid the expedited procedures under [Georgia Uniform Superior Court] Rule 44 that took effect for petitions filed on or after January 1, 1996." (Petitioner's Application for Certificate of Probable Cause to Appeal filed in the Supreme Court of Georgia, p. 5). Petitioner's petition was one of eleven prepared by the Resource Center and ostensibly filed "pro se" on December 20, 1995 in a calculated effort to avoid application to those cases of the new Uniform Superior Court Rule 44 scheduling timelines for first-time capital habeas corpus petitions.[2] *Id.*

Respondent[3] filed his Return and Answer and thereafter moved for entry of a scheduling order, advocating adoption by the habeas corpus court of a scheduling order which would be in accord with the timelines which had recently been promulgated by the Superior Court Judges Council, set forth in Uniform Superior Court Rule 44, and adopted by the Supreme Court of Georgia on December 15, 1995, as contemplated by O.C.G.A.

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[2] As is apparent from the circumstances surrounding Petitioner's voluntary and unprompted filing of his habeas corpus petition, Petitioner was not *forced* to proceed through state habeas corpus without counsel, and Petitioner's assertions to the contrary are both misleading and inaccurate.

[3] The Warden of the Georgia Diagnostic and Classification Prison is now Fredrick J. Head, who replaced former Warden Tony Turpin. Respondent has substituted Warden Head as the proper party Respondent pursuant to United States Supreme Court Rule 35.3.

§ 9-14-47.1(c), to govern first-time capital state habeas corpus petitions filed on or after January 1, 1996. Respondent acknowledged in his brief in support of the motion that the petition in the instant case had been filed prior to January 1, 1996, but suggested that the habeas corpus court exercise its inherent power to control the orderly progress of litigation pending before it by entering a scheduling order adopting a timetable for the case which would be in accord with the timelines set forth in Uniform Superior Court Rule 44. (App. at 30). On February 8, 1996, stating its purpose to control the orderly progress of litigation and facilitate a fair and orderly resolution of the issues, the habeas corpus court entered a scheduling order establishing deadlines for the filing of motions by the parties and for any amendments to the petition in accordance with the guidelines set forth in Uniform Superior Court Rule 44.[4] (App. at 35).

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[4] Petitioner's claim in his Statement of the Case that the habeas corpus court held that the new Uniform Superior Court Rule applied to Petitioner's case is incorrect. A review of the habeas corpus court's order confirms that the court in its discretion merely entered a scheduling order setting scheduling deadlines for Petitioner's case which were in accord with the timetables contemplated by the new Uniform Superior Court Rule. (App. at 35). Petitioner's assertion in his Statement of the Case that he was given four days to file pretrial motions and approximately one month to amend his petition is also incorrect. Petitioner was given ten days from the date the scheduling order was signed (and two months from the time his petition had been filed) to file motions and was given over two months from the date of the scheduling order to amend his petition. Further, Petitioner was eventually given almost nine months from the filing of his petition before his case was called for an evidentiary hearing. (Pet. App. at A91). Under the new

Although it was the Resource Center which prepared and filed the initial petition in this case on Petitioner's behalf, the Resource Center steadfastly refused to enter a formal appearance as counsel in Petitioner's case. Instead, during the months of February, March, April, May, June, July, and August of 1996, when the Resource Center could have been preparing Petitioner's case for a hearing, Resource Center attorney Ms. M. Elizabeth Wells filed six (6) separate motions as "amicus curiae" counsel seeking to postpone indefinitely the progress of Petitioner's case.

The Resource Center cited as the basis for such a postponement the fact that Petitioner was not represented by counsel, (Record Entry Numbers 10, 15, 18, 21, 23, and 24, hereinafter "R. ___"); however, Petitioner's lack of representation was a circumstance which Petitioner and the Resource Center themselves had contrived by the voluntary and unprompted filing of the habeas corpus petition. Instead of securing counsel and then filing a habeas corpus petition, Petitioner opted to file his petition despite the lack of a formal entry of appearance by counsel in a maneuver designed to avoid application of new scheduling timelines which were to govern first-time capital habeas corpus petitions filed on or after January 1, 1996.

In every capital state habeas corpus case both before and since Petitioner's, death row state habeas corpus litigants have been represented by the state-funded

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Uniform Superior Court Rule, his case would have been called for an evidentiary hearing within six months after the filing of the petition. (Pet. App. at A80).

Resource Center,[5] by defender organizations, or by pro bono counsel.[6] Additionally, Georgia has a system of institutional lawyers similar to the Virginia system found to be constitutionally satisfactory in *Murray v. Giarratano*, 492 U.S. 1 (1989), who contract with Georgia's prisons to provide legal assistance and representation to inmates. These institutional lawyers have been and remain available to represent death row inmates, including Petitioner, in their habeas corpus litigation. *See, e.g., State v. Davis*, 246 Ga. 200, 269 S.E.2d 461 (1980) (App. at 38). However, the services of these institutional lawyers were not utilized in Petitioner's case.

The habeas corpus court initially scheduled an evidentiary hearing for August 22, 1996, a date eight months subsequent to the filing of the petition. (R. 19). However, at the oral request of Resource Center attorney Ms. Wells during a telephone conference among the habeas corpus court, counsel for the Respondent Warden, and the Resource Center acting on Petitioner's behalf, the habeas corpus court postponed the evidentiary hearing until September 12, 1996. (R. 27).

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[5] At the time, $300,000.00 in state funds were appropriated annually to the Resource Center to assist volunteer counsel in the representation of capital state habeas corpus petitioners and to directly represent those petitioners. 1995 Ga. Laws 1082, 1085; 1996 Ga. Laws 1529, 1532. Currently, $500,000.00 in state funds are appropriated annually for that purpose. 1999 Ga. Laws 1071, 1074.

[6] Petitioner's inflammatory suggestion in his Statement of the Case that "shocking" cases are "accumulating in [the] wake" of the Supreme Court of Georgia's opinion in *Gibson v. Turpin* is both unsupported and untrue.

When the case was called for a hearing on September 12, 1996, Resource Center attorney Ms. Wells was present in the courtroom and on several occasions during the proceedings addressed the Court on Petitioner's behalf. (Pet. App. at A94-A105, A114, A145-A146). However, despite the habeas corpus court's promise to consider all the motions anew if Ms. Wells would enter an appearance on Petitioner's behalf, Ms. Wells refused the court's repeated entreaties, demanding to know in advance what the court's ruling on additional time would be before she would enter an appearance. When the court refused to pre-announce what his reconsidered rulings would be, Ms. Wells declined to enter her appearance, but remained in the courtroom outside the bar, and the habeas corpus hearing proceeded.[7] (*Id.* at A94-A104).

On March 11, 1997, the habeas corpus court entered an order denying Petitioner habeas corpus relief. The court found as a matter of fact in its final order that "given Petitioner's demeanor and his statements at the evidentiary hearing, [ ] Petitioner made a conscious choice not to proceed with his case at the evidentiary

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[7] Respondent disputes Petitioner's assertions in his Statement of the Case that Petitioner's case was "pushed" to an evidentiary hearing (almost nine months after the filing of his petition) before counsel "could be found" to represent him and his suggestion that "good faith efforts to secure counsel" were underway. Petitioner has provided no support for his assertions that counsel could not be found to represent him despite good faith efforts, and Respondent seriously doubts the credibility of this assertion, given the availability of the Center for Prisoners' Legal Assistance, Inc., the successor organization to the Prisoner Legal Counseling Project discussed in *State v. Davis, supra*, 269 S.E.2d 461 (*see* App. at 38), to take Petitioner's case.

hearing."[8] (Pet. App. at A35). The habeas corpus court relied upon this Court's decisions in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), *Murray v. Giarratano, supra*, 492 U.S. 1, and *Bounds v. Smith*, 430 U.S. 817 (1977), and upon the State of Georgia's framework for the litigation and review of capital cases in ruling that Petitioner was not entitled to counsel under the federal constitution in his capital state habeas corpus proceeding. (Pet. App. at A35-A38).

In ruling on the claims in the habeas corpus petition, the habeas corpus court considered the evidence before it, which included the transcript of the trial court proceedings in Petitioner's criminal case, and found that Petitioner's attorney performed reasonably in his representation of Petitioner and that no prejudice existed from any possible errors by counsel. The court denied Petitioner's claim of ineffective assistance of counsel and his other claims for habeas corpus relief.[9] (*Id.* at A31-A70.)

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[8] Respondent disputes Petitioner's assertion in his Statement of the Case and elsewhere in the Petition for Certiorari that Petitioner is "borderline mentally retarded." While Petitioner tested in the "Borderline Range of Intelligence" on a defense I.Q. test prior to trial, the defense psychologist concluded that Petitioner was not putting forth his best effort on the test, that his I.Q. was probably "at least five or six points higher," and that "he's certainly not retarded." Further, Petitioner scored in the 80's on the prior I.Q. test given by the court-appointed psychologist, who reported that Petitioner fell into the "Average Range of Intelligence." (App. at 43, 46, 55, 57; *see also* App. at 62, 64, 65, 66).

[9] Respondent disputes Petitioner's assertions in his Statement of the Case that Respondent engaged in "improper questioning" of Petitioner's trial counsel or of Petitioner at the

Petitioner is incorrect in his representation, made throughout his Petition for Certiorari, that "[i]neffective assistance claims cannot be raised on direct review in Georgia, and must be raised for the first time in state habeas." (Petition for Certiorari, p. 10). Under Georgia law, state habeas corpus is not a litigant's first opportunity to raise an ineffective assistance of trial counsel claim.

Although Petitioner proceeded with his same trial counsel in his motion for new trial and direct appeal proceedings, a capital litigant in Georgia is free to secure new counsel for his motion for new trial and direct appeal, a stage at which he is constitutionally entitled to counsel, and may litigate the claim of ineffective assistance of trial counsel at that time, instead of holding that claim until the collateral post-conviction stage. In fact, Georgia's jurisprudence encourages early litigation of claims of ineffective assistance of counsel, within the framework of the criminal case, when the capital litigant remains constitutionally entitled to representation by compensated counsel and to reasonable funds for litigation. The Supreme Court of Georgia has instructed:

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habeas corpus evidentiary hearing. The questioning of trial counsel was not objectionable because Petitioner's claims of ineffective assistance against his former counsel operated as a waiver of attorney-client privilege. The questioning of Petitioner was not objectionable as both Petitioner and the Resource Center maintained that the Resource Center attorneys were not acting as Petitioner's counsel in his habeas corpus proceedings; therefore, Petitioner was estopped from asserting a claim of attorney-client privilege with regard to communications between himself and Resource Center attorneys.

> It is a requisite of a sound system of criminal justice, serving alike the proper ends of defendants and of the public, that any contention concerning the violation of the constitutional right of counsel should be made at the earliest practicable moment.

Thompson v. State, 257 Ga. 386, 359 S.E.2d 664 (1987) (quoting *Smith v. State*, 255 Ga. 654, 655-656, 341 S.E.2d 5 (1986)). *See also White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991); *Glover v. State*, 266 Ga. 183, 465 S.E.2d 659 (1996) (recognizing as "axiomatic" the rule that ineffective assistance of trial counsel must be raised at "the earliest practicable moment," and encouraging early litigation of ineffective assistance of trial counsel claims).

Contrary to Petitioner's suggestions throughout his Petition for Certiorari, Petitioner could have secured new counsel at the motion for new trial stage of his criminal case, raised and engaged in evidentiary development of an ineffective assistance of trial counsel claim in his motion for new trial, and sought review of the ineffective assistance of trial counsel issue on direct appeal. State habeas corpus was not Petitioner's first opportunity to have raised an ineffective assistance of trial counsel claim.

On March 20, 1997, nine days after the entry of the habeas corpus court's order denying habeas corpus relief, Petitioner filed his Notice of Appeal in the Superior Court of Butts County. That same day, the law firm of King & Spalding entered its appearance in the Supreme Court of Georgia on Petitioner's behalf. On May 27, 1997, King & Spalding attorneys filed Petitioner's Application for a Certificate of Probable Cause to Appeal the habeas

corpus court's order denying habeas corpus relief.[10] Respondent filed his "Response to Application for Certificate of Probable Cause to Appeal," (*see* App. at 67), asserting that the issuance of a Certificate of Probable Cause to Appeal was not warranted in this case.

The representation by Petitioner in his Statement of the Case that "the issues were fully addressed in the substantial briefs submitted by the parties," (Petition for Certiorari, p. 8 n.5), is incorrect. Although Petitioner filed "plenary briefs" to accompany his Application for Certificate of Probable Cause to Appeal, Respondent appropriately limited his brief in the Supreme Court of Georgia to the issue which was then before that court, whether to issue a Certificate of Probable Cause to Appeal to permit Petitioner to appeal the denial of habeas corpus relief. Because the Supreme Court of Georgia never issued a Certificate of Probable Cause to Appeal in Petitioner's case, Respondent appropriately never filed a substantive brief on the issues which Petitioner sought to appeal in his case. (*See* App. at 67).

On February 22, 1999, the Supreme Court of Georgia denied Petitioner's Application for Certificate of Probable Cause to Appeal, and on April 9, 1999, denied Petitioner's motion for reconsideration of that denial. *Gibson*

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[10] Georgia law provides that the appeal of the denial of habeas corpus relief is a discretionary appeal, and a petitioner seeking to appeal the denial of habeas corpus relief must file with the Supreme Court of Georgia an Application for a Certificate of Probable Cause to Appeal. An appeal is allowed only if the Supreme Court of Georgia grants the Application and issues a Certificate of Probable Cause to Appeal. O.C.G.A. § 9-14-52.

v. Turpin, 270 Ga. 855, 515 S.E.2d 186 (1999) (Pet. App. at A1-A30, A71).

This case therefore reaches this Court on a petition for certiorari review of an opinion accompanying a state supreme court disposition denying discretionary review in a collateral habeas corpus proceeding.

REASONS FOR NOT GRANTING THE WRIT

I. THIS CASE DOES NOT PRESENT EITHER OF THE QUESTIONS PURPORTEDLY RESERVED BY THIS COURT IN *MURRAY V. GIARRATANO* AND *COLEMAN V. THOMPSON*.

As a straightforward factual matter, this case does not present either of the questions purportedly reserved by this Court in *Murray v. Giarratano, supra*, 492 U.S. 1, and *Coleman v. Thompson*, 501 U.S. 722 (1991).

As demonstrated by the procedural history of this case, Petitioner was not "forced" to proceed without the assistance of counsel for state collateral review, and state habeas corpus was not the first forum in which Petitioner could have presented constitutional claims. Instead, the record shows unequivocally that without State prompting and to avoid new timelines, Petitioner voluntarily filed a habeas corpus petition prepared by the Resource Center and that throughout the pendency of the state habeas corpus proceedings, Petitioner enjoyed de facto representation by Resource Center attorneys. The Resource Center's chosen strategy for Petitioner's case was simply to

postpone Petitioner's case indefinitely or, barring that, to contrive a constitutional dilemma that, as a factual matter, does not arise in Georgia.

Petitioner's case thus does not present the question left open by *Giarratano*. In that case, Justice Kennedy (who provided the fifth vote in his concurrence) pointed out that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." *Giarratano*, 492 U.S. at 14-15. Justice Kennedy's observation is equally true for Georgia.

Petitioner's case is not a case where a state prisoner was *unable* to obtain counsel to represent him in postconviction proceedings. As Petitioner himself acknowledges, the unprompted filing of his habeas corpus petition, without first securing formal representation by counsel, was a maneuver designed to avoid the application of new state habeas corpus timelines to his case. The fact that Petitioner voluntarily filed his habeas corpus petition under these circumstances belies Petitioner's repeated claim to this Court that Petitioner was "forced" to proceed without counsel in state post-conviction. This fact alone removes Petitioner's case from the circumstances reserved by Justice Kennedy in *Giarratano*.

Moreover, Petitioner in reality enjoyed representation by counsel. It is apparent even from the Resource Center's court filings that their "amicus" status was nothing more than a ruse to hide the fact that the Resource Center was functioning as counsel for Petitioner. For example, although nominally "amicus curiae" motions, the

Resource Center's early motions denominate Petitioner himself as the movant. These motions read, "Comes now EXZAVIOUS LEE GIBSON, by and through undersigned *amicus curiae* counsel. . . . " (R. 10, 13). This mode of pleading was only discontinued following Respondent's suggestion that the Court interpret such action by the Resource Center as a formal entry of appearance on Petitioner's behalf. (R. 11).

As an examination of the procedural history of this case makes clear, Petitioner was not denied meaningful access to the courts under this Court's decisions in *Bounds* and *Giarratano*. Instead, even without a formal entry of appearance by the Resource Center attorneys, Petitioner received the assistance of counsel, thus satisfying "meaningful access."

As Justice Kennedy observed in his concurring opinion in *Giarratano*: "The requirements of meaningful access may be satisfied in various ways, [and] [t]he intricacies and range of options are of sufficient complexity that state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions." *Giarratano*, 492 U.S. at 14 (quoting *Bounds*, 430 U.S. at 833). In Georgia, the General Assembly has chosen to appropriate $500,000.00 annually[11] to the Resource Center to assist volunteer counsel in the representation of indigent capital state habeas corpus petitioners and to

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[11] The Resource Center was appropriated $300,000.00 annually at the time of Petitioner's voluntary filing of his habeas corpus petition in December 1995. *See* n. 5, *supra*.

directly represent those petitioners.[12] It is clear from an examination of the procedural history of this case that the Resource Center assisted in Petitioner's state habeas corpus litigation. Petitioner and the Resource Center simply chose to concentrate that assistance on efforts to postpone Petitioner's case instead of on the advancement of the substantive claims in the habeas corpus petition.

Therefore, it is clear that the circumstances of Petitioner's case do not present the question reserved by this Court in *Giarratano*, but in fact mirror the circumstances approved by Justice Kennedy in his concurring opinion in that case.

Nor does this case present the issue purportedly reserved by this Court in *Coleman*. In *Coleman*, the Court declined to address whether there is a constitutional right to counsel in post-conviction where "state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755. However, the Court in *Coleman* noted its previous holdings in *Ross v. Moffitt*, 417 U.S. 600, 616 (1974), and *Pennsylvania v. Finley, supra*, 481 U.S. at 556, that the Constitution does not require States to provide counsel "in state discretionary appeals where defendants already had one appeal as of right" or "in state collateral proceedings after exhaustion of direct appellate review." *Coleman*, 501 U.S. at 756.

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[12] In addition to the Resource Center, Georgia maintains a system of institutional lawyers similar to the system in place in Virginia at the time of this Court's decision in *Giarratano*, who contract with Georgia's prisons to provide legal assistance and representation to inmates and who were available to assist or represent Petitioner in his habeas corpus litigation.

The Court continued: "These cases dictate the answer here. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that Coleman had a right to counsel to appeal a state collateral determination of his claim of trial error." *Id.* at 756-757.

This reasoning applies with equal force in Petitioner's case to dictate the answer set forth by the Supreme Court of Georgia in *Gibson v. Turpin*. In Georgia, collateral review is not the first place a capital litigant can present a claim of ineffective assistance of trial counsel. Rather, Georgia law permits the early litigation of an ineffective assistance of trial counsel claim, and any necessary evidentiary development of that claim can occur at the motion for new trial stage of a defendant's direct review proceedings,[13] when Georgia requires that the State provide defendants with counsel. *See, e.g., Williams*

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[13] *See, e.g., Davis v. State*, 263 Ga. 5, 426 S.E.2d 844 (1993) (new attorney appointed to review record for effectiveness of trial counsel and raise any ineffective assistance of trial counsel issues on motion for new trial while trial attorneys continued to represent death row defendant on all other issues at motion for new trial and direct appeal); *Kennebrew v. State*, 267 Ga. 400, 480 S.E.2d 1 (1996) (defendant entitled to new counsel upon request following trial to advance claim of ineffective assistance of trial counsel); *Glover, supra*, 465 S.E.2d at 661, n.6 (encouraging early litigation of ineffective assistance of trial counsel claims); *Williams v. Head*, Case No. 97-8983, slip op. at 4 (11th Cir. Aug. 26, 1999) ("Georgia capital defendant has right to effective assistance of counsel in a [motion for] new trial proceeding, which is where ineffective assistance claims are decided under Georgia's Unified Appeal Procedure") (citing *Williams v. Turpin, supra*, 87 F.3d at 1209-1210).

v. Turpin, 87 F.3d 1204, 1209-1210 (11th Cir. 1996). Therefore, in Georgia, collateral review will never be the first time that a capital litigant could have presented a claim of ineffective assistance of trial counsel.[14] Where a capital litigant in Georgia remains with trial counsel for his motion for new trial and direct appeal proceedings – so that his claim of ineffective assistance of trial counsel is not raised during his direct review proceedings when he remains constitutionally entitled to representation by counsel – the postponement of that claim from direct review to collateral review should not alter the analysis of this Court so as to entitle that litigant to counsel as a constitutional matter. This was not the question left open by *Coleman*.

Because this case is factually and legally distinct from the questions purportedly reserved by this Court in *Giarratano* and *Coleman*, this Court should resist Petitioner's enticement to grant certiorari.

II. THERE IS NO DIVISION AMONG THE COURTS WARRANTING SUPREME COURT INTERVENTION.

Contrary to Petitioner's representations, state and federal courts which have considered the issue are generally in accord that a post-conviction petitioner does not possess a constitutional entitlement to counsel in state

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[14] A claim of jury misconduct or knowing use of perjured testimony can likewise be litigated at the motion for new trial, and a claim of failure to produce exculpatory evidence can be presented on direct appeal if a sealed copy of the prosecutor's file is made a part of the record for direct review.

collateral review proceedings. Further, as confirmed by an examination of the Mississippi Supreme Court's opinion in *Jackson v. Mississippi*, 732 So.2d 187 (Miss. 1999), that court's holding is based on circumstances unique to the nature of death penalty litigation in Mississippi,[15] and the opinion of the Supreme Court of Georgia denying Petitioner's Application for Certificate of Probable Cause to Appeal in *Gibson v. Turpin* does not conflict with the narrow holding of the Mississippi Supreme Court.

The opinion of the Supreme Court of Georgia in *Gibson v. Turpin*, accompanying the denial of discretionary review from the habeas corpus court, is in accord with the holdings of every federal circuit court and with every state court which has examined the issue whether there is a constitutional right to representation by counsel in state collateral review proceedings, save the Supreme Court of Mississippi. This singularity of results refutes Petitioner's claim that the courts generally are unclear on this issue and need the intervention of this Court.

As the Supreme Court of Georgia noted in its opinion in *Gibson v. Turpin*, 513 S.E.2d at 191 (Pet. App. at A9), every federal court of appeals which has examined the issue has rejected the argument that there is a constitutional right to counsel in state post-conviction, even where state post-conviction may be the first available forum for litigation of a claim of ineffective assistance of counsel. *See Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997); *Parkhurst v. Shillinger*, 128 F.3d 1366 (10th Cir.

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[15] Moreover, the Mississippi court's declaration of a constitutional right to counsel may not have been founded upon the federal constitution.

1997); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996); *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir. 1996); *Nolan v. Armontrout*, 973 F.2d 615 (8th Cir. 1992).

Among the states, Mississippi is alone in proclaiming the existence of a constitutional right to counsel in capital post-conviction proceedings. Every other state which has examined the issue has rejected the argument that there is a constitutional right to counsel in capital state post-conviction proceedings. *See, e.g., State v. Mata*, 916 P.2d 1035 (Ariz. 1996); *Fretwell v. State*, 718 S.W.2d 109 (Ark. 1986); *In re Clark*, 855 P.2d 729 (Cal. 1993); *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998); *People v. Owens*, 564 N.E.2d 1184 (Ill. 1990); *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998); *State v. Hunter*, 840 S.W.2d 850 (Missouri 1992); *Gollehon v. District Court of the Third Judicial District*, 897 P.2d 1058 (Mont. 1995); *State v. Victor*, 494 N.W.2d 565 (Neb. 1993); *McKague v. Warden*, 912 P.2d 255 (Nev. 1996); *State v. Scudder*, 1998 Ohio App. LEXIS 5642 (Ohio App. 1998), *discretionary review denied*, 85 Ohio St.3d 1456 (1999); *Braun v. State*, 937 P.2d 505 (Okla. Crim. App. 1997); *Commonwealth v. Peterkin*, 649 A.2d 121 (Penn. 1994); *House v. State*, 911 S.W.2d 705 (Tenn. 1995); *Ex parte Davis*, 947 S.W.2d 216 (Tex. 1996); *In re Gentry*, 972 P.2d 1250 (Wash. 1999).

It is not clear from the *Jackson* opinion whether the constitutional right to counsel found in that case is based upon the federal constitution. The majority in *Jackson* begins its discussion of the state appeal process by noting that a conviction and sentence of death is subject to automatic review in Mississippi and that "[t]he Constitution of Mississippi requires the appointment of counsel pursuant to that automatic review." *Jackson*, 732 So.2d at

189. The concurrence in *Jackson*, which would find a right to counsel for Mississippi capital post-conviction litigants based in state statute, opines that "[t]he majority errs by stating, without authority, that [a right to counsel in post-conviction relief proceedings] is found in the Mississippi Constitution of 1890." *Id.* at 192 (Mills, J. specially concurring).

If, as the concurring opinion in *Jackson* suggests, the Supreme Court of Mississippi did not base the right to counsel announced in *Jackson* upon the federal constitution, the opinion in *Jackson* is not even arguably inconsistent with the opinion of the Supreme Court of Georgia in *Gibson v. Turpin*, and the sole purported conflict does not exist.

Even if the Mississippi high court based its right to counsel for that state's capital post-conviction litigants upon the federal constitution, its opinion in *Jackson* does not conflict with *Gibson v. Turpin* as the holding in *Jackson* rests on the unique circumstances of death penalty litigation in Mississippi, circumstances not present in Georgia's capital litigation system. As the Mississippi high court explicitly stated, its bases for finding a right to counsel were the finality of the death penalty itself and *"the nature of death penalty litigation in the courts of this state."* *Id.* at 188 (emphasis added).

In examining the nature of death penalty litigation in the courts of Mississippi, the *Jackson* court found that state post-conviction proceedings in Mississippi "have become a part of the death penalty appeal process at the state level." *Id.* at 191. In Georgia, by contrast, habeas corpus remains "a collateral attack that is separate and

distinct from direct review . . . . It is not an extension of direct appeal." *Gibson v. Turpin*, 513 S.E.2d at 188. (Pet. App. at A4).

The nature of death penalty litigation in Mississippi is also distinct from the nature of death penalty litigation in Georgia because state post-conviction is the first place a Mississippi capital litigant can engage in evidentiary development of a claim of ineffective assistance of trial counsel. In Mississippi, "[c]ertain issues *must* often be deferred until the post-conviction stage, such as the claim of ineffective assistance of counsel." *Jackson*, 732 So.2d at 190 (emphasis added). As the Supreme Court of Mississippi outlined in *Read v. State*, 430 So.2d 832, 841-842 (Miss. 1983), while a claim of ineffective assistance of counsel may be asserted by new counsel on direct appeal in Mississippi, the appellate court will only reach the merits of such a claim on direct appeal if ineffectiveness is affirmatively shown from the record of the trial proceedings or if the parties stipulate that the record is adequate and the appellate court "determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc., are not needed." *Id.* at 841.

> In all other cases, however, inasmuch as the ineffective assistance of counsel issue substantially raises issues of fact, an evidentiary hearing will be necessary. There is no point in holding such a hearing, however, and going to all of that time, trouble, expense and agony, if the case is going to be reversed and remanded on other grounds. Where that occurs, any ineffectiveness of counsel will likely be mooted. Only in those cases where the Court cannot decide the ineffective assistance of counsel issue

> on the record presented on direct appeal and in those cases where the judgment of conviction is otherwise affirmed will it be necessary actually to hold evidentiary hearings.

Id. at 842 (footnote omitted). *See also Colenburg v. State*, 735 So.2d 1099 (Miss. App. 1999) (to be "susceptible to review by an appellate court requires that the issue of a trial counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record").

Thus, inherent in "the nature of death penalty litigation in the courts of [Mississippi]" is that a capital litigant in Mississippi can only engage in evidentiary development of a claim of ineffective assistance of trial counsel in collateral post-conviction proceedings.

By contrast, a capital litigant in Georgia is not required to wait until post-conviction review to engage in evidentiary development of a claim of ineffective assistance of trial counsel. Instead, Georgia law not only permits, but encourages, the early litigation of an ineffective assistance of trial counsel claim, and any necessary evidentiary development of that claim can occur at the motion for new trial stage of a defendant's direct appeal proceedings, when a capital litigant remains constitutionally entitled to representation by counsel to litigate his claim of ineffective assistance of trial counsel. *See, e.g., Davis v. State, supra*, 426 S.E.2d 844; *Kennebrew, supra*, 480 S.E.2d 1; *Glover, supra*, 465 S.E.2d 659; *Williams v. Head, supra*, Case No. 97-8983 (11th Cir. Aug. 26, 1999). *See* n. 13, *supra*. Therefore, in Georgia, collateral review continues to retain its collateral purpose. *See, e.g., Williams v. Head, supra*, Case No. 97-8983 (where capital litigant had new counsel who raised ineffective assistance of trial

counsel claim at motion for new trial, it is the evidence presented at the motion for new trial proceedings which will be dispositive of litigant's ineffective assistance of trial counsel claim).

This Court's jurisprudence has consistently recognized that while a defendant has a constitutional right to counsel to litigate his "one and only appeal" of right,[16] the right to counsel does not extend to state collateral proceedings after exhaustion of direct appellate review. It is clear from the nature of death penalty litigation in Georgia that Georgia post-conviction proceedings cannot be considered a capital litigant's "one and only appeal" of right, and that post-conviction proceedings in Georgia remain collateral. Therefore, for a system such as Georgia's, where ineffective assistance of trial counsel can be developed and litigated in a motion for new trial and where habeas corpus "is not an extension of direct appeal," the *Gibson v. Turpin* opinion appropriately recognizes the rationale of *Ross, Finley,* and *Giarratano* as controlling.

Finally, another important difference in the nature of death penalty litigation in Mississippi and the nature of death penalty litigation in Georgia is that "[i]n Mississippi, repeatedly since 1995, death row inmates have been unable to obtain counsel or requisite help from institutional lawyers." *Jackson,* 732 So.2d at 191. By contrast, in Georgia every death row habeas corpus litigant both

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[16] *Coleman, supra,* 501 U.S. at 756 (quoting *Douglas v. California,* 372 U.S. 353, 357 (1963)).

before and since Petitioner has been represented by counsel in state post-conviction proceedings.

Because the nature of death penalty litigation in Mississippi differs in critical respects from the nature of death penalty litigation in Georgia, it is clear that the Mississippi high court's opinion in *Jackson*, drawn narrowly on circumstances unique to Mississippi, does not conflict with the opinion of the Supreme Court of Georgia in *Gibson v. Turpin*.

III. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR THE GRANT OF CERTIORARI.

Due to the procedural posture of this case, arriving at this Court on a petition for certiorari review of an opinion accompanying a state supreme court disposition denying discretionary review, the record below is not developed.

The only issue before the Georgia Supreme Court for determination below was whether to issue Petitioner a Certificate of Probable Cause to Appeal, thus permitting a discretionary appeal of the state habeas corpus court's order denying relief. In the absence of an order of the Georgia Supreme Court issuing a Certificate of Probable Cause to Appeal, no issues were accepted for appeal. As the state supreme court below never accepted any issues for briefing on the merits, this case does not provide the Court with the benefit of briefing below by Respondent.

Further, and of paramount significance to this Court's decision whether to exercise its certiorari jurisdiction, this case does not present the facts which Petitioner

claims exist in seeking certiorari review. Namely, this is *not* a case where a death row inmate was unable to obtain representation or assistance from counsel and was forced to "fend for himself" in collateral review proceedings which were his only opportunity to present crucial constitutional claims.

Moreover, because the true issue before the habeas corpus court was never that representation or assistance was unavailable to Petitioner but rather whether the habeas corpus court was to be required to abdicate control over the progress of a habeas corpus case pending before it,[17] the record in the habeas corpus court below was never developed with the types of information and statistics which would be necessary if a court were to examine the question whether a capital post-conviction petitioner has a constitutional entitlement to counsel.

Finally, Respondent notes that if this Court declines to exercise its certiorari jurisdiction at this time, the lower federal courts will have an opportunity to examine the state post-conviction proceedings and grant an evidentiary hearing to Petitioner on his claims in federal court if the federal courts determine that an evidentiary hearing is warranted.

For all of these reasons, this is not an appropriate case for the grant of certiorari.

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[17] *See* Respondent's response opposing a grant of discretionary review. (App. at 67, 89).

CONCLUSION

For all the above and foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

THURBERT E. BAKER
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PAIGE REESE WHITAKER
Assistant Attorney General
(*Counsel of Record*)

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IN THE SUPERIOR COURT OF BUTTS
STATE OF GEORGIA

EXZAVIOUS GIBSON ,
Petitioner,

EF 261140 ,
Inmate Number

vs

ALBERT G. THOMAS ,
Warden,
Georgia Diagnostic and
Classification Center ,
Name of Institution
Respondent.

Civil Action No. 95-V-648

Habeas Corpus

(Filed Dec. 20, 1995)

APPLICATION FOR WRIT OF HABEAS CORPUS

**** PART I ****

1. Name and county of court which entered the judgment of conviction under attack Superior Court of Dogde [sic] County

2. Date of conviction June 14, 1990

3. Length of sentence(s) Death, Life (armed robbery)

4. Name of offense(s) (all counts) Murder, Armed Robbery

5. What was your plea? (Check one)

   (a) Guilty ( )
   (b) Guilty but mentally ill ( )
   (c) Nolo contendere ( )
   (d) Not guilty (x)

If you entered a guilty plea to one count or indictment, and a not guilty or nolo contendere plea to another count or indictment, give details:

_____

_____

_____

6. Kind of trial: (Check one)

   (a) Jury (x)
   (b) Judge only ( )

7. Did you testify at the trial: Yes (x) No ( )

8. Did you appeal from the conviction: Yes (x) No ( )

9. If you did appeal, answer the following:

   (a) Name of appellate court to which you appealed Supreme Court of Georgia
   (b) Result of appeal Conviction and Sentence Affirmed
   (c) Date of result June 10, 1991

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this conviction in any state or federal court: Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information: (If more than three petitions, please use separate sheet of paper and use the same format to list these petitions.)

    (a) (1) Name of court and case number U.S. Supreme Court
        (2) Nature of proceeding Petition for Writ of Certiorari
        (3) All grounds raised (attach extra sheet if necessary) See Attached

(4) Did you receive an evidentiary hearing on your application or motion?
Yes ( ) No (x)
(5) Name of Judge _____
(6) Result Certiorari Denied
(7) Date of result February 24, 1992

(b) As to any second petition, application or motion give the same information:

(1) Name of court and case number n/a
(2) Nature of proceeding _____

(3) All grounds raised _____

(4) Did you receive an evidentiary hearing on your application or motion?
Yes ( ) No ( )
(5) Name of Judge _____
(6) Result _____
(7) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court and case number n/a
(2) Nature of proceeding _____

(3) All grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Name of Judge _____

(6) Result _____

(7) Date of result _____

(d) Did you appeal to the Georgia Supreme Court or the Georgia Court of Appeals from the result taken on any petition, application or motion listed above:

(1) First petition, etc. Yes ( ) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did not appeal from the denial of relief on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

(f) If you appealed to the highest state court having jurisdiction, did you file a petition for certiorari in the United States Supreme Court to review the denial of your petition by the Georgia Supreme Court or the the [sic] Georgia Court of Appeals? Yes ( ) No ( )

**** PART II ****

State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may

attach pages stating additioinal [sic] grounds and facts supporting same.

1

Ground one: See Attached

Supporting FACTS (tell your story briefly without citing cases or law):

2

Ground two: See Attached

Supporting FACTS (tell your story briefly without citing cases or law):

3

Ground three: See Attached

Supporting FACTS (tell your story briefly without citing cases or law):

4

Ground four: See Attached

Supporting FACTS (tell your story briefly without citing cases or law):

**** PART III ****

If any of the grounds listed in PART II were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

**** PART IV ****

1. Do you have any petition or appeal now pending in any court, either state or federal, as to the conviction under attack?
   Yes ( ) No (x)

2. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing W. Dennis Mullis, 202 Cherry Street, Cochran, GA 31014

(b) At arraignment and plea W. Dennis Mullis

(c) At trial W. Dennis Mullis

(d) At sentencing W. Dennis Mullis

(e) On appeal W. Dennis Mullis

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

3. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (x) No ( )

Do you have any future sentence to serve after you complete the sentence imposed by the conviction under attack? Yes ( ) No (x)

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment wich [sic] imposed the sentence to be served in the future: Yes (x) No ( )

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Pro Se _____ ____
_____ Date
_____
Signature and Address of
Petitioner's Attorney (if any attorney)

I declare (or certify, verify, or state) under penalty of prejury [sic] that the foregoing is true and correct. Executed on Dec. 15, 1995
Date

/s/ E.L. Gibson
Signature of Petitioner

Please note that under O.C.G.A. §9-14-45 service of a petition of habeas corpus shall be made upon the person having custody of the petitioner. If you are being detained under the custody of the Department of Offender Rehabilitation, an additional copy of the petition must be served on the Attorney General. If you are being detained under the custody of some authority other than the Department of Offender Rehabilitation, an additional copy of the petition must be served upon the district attorney of the county in which the petition is filed. Service upon the Attorney General or the district attorney may be had by mailing a copy of the petition and a proper certificate of service.

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON, Petitioner, v. ALBERT G. THOMAS, Warden, Georgia Diagnostic and Classification Center, Respondent.	HABEAS CORPUS No. 95-V-648 (Filed Dec. 20, 1995)

PETITION FOR WRIT OF HABEAS CORPUS

EXZAVIOUS LEE GIBSON, pro se, petitions this Court for a Writ of Habeas Corpus, pursuant to O.C.G.A. §§ 9-14-41 *et seq.* Mr. Gibson is an indigent person currently under sentence of death. Respondent is the Warden of the Georgia Diagnostic and Classification Center in Jackson, Georgia. The allegations of this petition are set forth as follows:

I. INTRODUCTION

This Petition was prepared by personnel at the Georgia Appellate Practice and Educational Resource Center, Inc. ("Resource Center"). The Resource Center was established as a result of the combined efforts of the State Bar of Georgia, the Attorney General of Georgia, and the state and federal bench, to help ensure that all death-sentenced

Georgia inmates are adequately represented in their post-conviction appeals. There is no state mechanism for providing counsel to death-sentenced inmates in post-conviction proceedings. The Resource Center, funded by the Judicial Counsel of Georgia, aids attorneys who volunteer to represent capital inmates *pro bono*, by assisting in investigating their cases, identifying issues, researching petitions and briefs, and preparing for hearings.

Petitioner is under sentence of death in the State of Georgia. One of the functions of the Resource Center is to find volunteer, *pro bono* counsel for death-sentenced inmates in Georgia. That process is a time-consuming one, inasmuch as capital post-conviction cases are difficult to investigate and research, under the best of circumstances. Frequently such cases involve voluminous records, and require the expenditure of large sums of money in order to assure proper representation. *See, Atlanta Journal Constitution*, December 12, 1993, "Death row cases hold appeal for too few lawyers." Petitioner's case is such a case.

The Resource Center has been unable to locate volunteer counsel for Petitioner, despite good faith efforts to do so. This state of affairs is neither surprising nor unusual, and is not the fault of Petitioner.[1] Having not found

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[1] Due to difficulties encountered in recent efforts to recruit counsel for death sentenced habeas petitioners, the Resource Center has enlisted the assistance of the Georgia Supreme Court in its search (*see* Appendix A, letters to Chief Justice Benham and Justice Fletcher). The Court has notified the Center that it will take up the matter of the recruitment of volunteer counsel in January (*see* Appendix B, letter to Stephen Kinnard).

counsel for Petitioner, the Resource Center prepared the instant pleading. The Petition raises issues which require an evidentiary hearing for proper resolution. For example, Petitioner has alleged ineffective assistance of counsel, and has alleged that the state failed to reveal material exculpatory evidence at trial and sentencing. These and other issues require evidentiary development.

Through this Petition, Mr. Gibson has presented issues routinely litigated in state habeas proceedings. However, until he receives the assistance of competent counsel, independent from his trial and appellate counsel, he is unable effectively to investigate and research his case in a manner reasonably likely to reveal all potential constitutional error existent in his conviction and sentencing. Petitioner is entitled to the assistance of such counsel.[2]

However, the Resource Center's ability to provide assistance in Mr. Gibson's case is subject to funding and staffing limitations. Historically, the Resource Center has assumed a critical role in the post-conviction representation of virtually every death-sentenced inmate in Georgia. But recent developments have ripped out the

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[2] "It is imperative that the courts have before them counsel who are competent in capital cases. . . . We do think it's essential that competent counsel be obtained in capital cases and it's very difficult to obtain them. . . . The records are huge, the expenditure of time is great. The lawyers who take these cases are burned out after taking just one whether they win or lose it. This is a very, very difficult area." *House Appropriations Subcomm.*, 104th Congress, 1st Sess. (March 8, 1995), testimony of Justice Anthony Kennedy, U.S. Supreme Court).

underpinnings of this system, forcing Mr. Gibson to proceed without the assistance of counsel.

On September 30, 1995, the Resource Center lost all federal grant funding. Since its inception, the Georgia Resource Center has relied upon the federal government for the bulk of its operating budget – seventy (70) percent of its funding. Due to this loss of federal funding, the Resource Center was forced to lay off six attorneys, three investigators and one administrative assistant. The present staff consists of two attorneys, one investigator and one administrative assistant.

The Resource Center is currently assisting in the maximum number of cases it can, given staffing and resources. Consequently, the Resource Center's ability to assist Mr. Gibson is, at least at this time, limited to the search for volunteer counsel to represent Mr. Gibson in these proceedings.

By virtue of this petition, Mr. Gibson notifies this Court that he is actively seeking counsel to represent him in these habeas proceedings. Mr. Gibson urges the Court to allow him time to procure qualified counsel. The assistance of qualified counsel in a death penalty habeas proceeding is necessary to insure that Mr. Gibson receives a full and fair hearing, and to insure that justice is done. The United States Supreme Court has recently recognized that death sentenced federal habeas petitioner's have a "mandatory right to qualified legal and related services [i]n any [federal] post conviction proceeding." *McFarland v. Scott*, 114 S.Ct. 2568, 2571 (1994). The Court premised its decision upon the finding that the complex nature of

capital litigation and the seriousness of the penalty necessitate "quality legal representation." *Id.* at 2572. This is as true in state court as it is in federal court. Capital post-conviction litigation is a highly specialized and difficult field of practice. Without the assistance of an attorney, Mr. Gibson may inadvertently omit available constitutional claims, resulting in a procedurally [sic] bar for federal court. To deny Mr. Gibson an opportunity to procure the services of counsel in these critical state court proceedings would deprive him of a full, fair and reliable forum for the litigation of his claims of state and federal constitutional error.

II. HISTORY OF PRIOR PROCEEDINGS

Mr. Gibson was convicted of malice murder and armed robbery in the Superior Court of Dodge County, Georgia, in 1990. He was sentenced to death for the murder conviction and life imprisonment for the armed robbery.

A motion for new trial was denied and Mr. Gibson's convictions and sentences were affirmed by the Georgia Supreme Court on direct appeal. *Gibson v. State,* 404 S.E. 2d 781 (Ga. 1991). A petition for writ of certiorari filed with the United States Supreme Court was denied on February 24, 1992.

III. CLAIMS FOR RELIEF

Each claim for relief raised below is predicated on Article I, § 1, ¶¶ 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 18 of the Constitution of the State of Georgia, and the Fourth, Fifth,

Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and on other law set forth in the Petition.

CLAIM I

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF ART. I, § 1, ¶¶ 1, 2, 14 & 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA, THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND *STRICKLAND v. WASHINGTON*, 466 U.S. 688 (1984).

This claim is evidenced by the following facts:

1. All other allegations in this Petition are incorporated into this Claim by specific reference.

2. Petitioner was denied his right to the effective assistance of counsel at his capital trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 1, ¶¶ 1 & 14 of the Constitution of the State of Georgia. Trial counsel's ineffectiveness includes, but is not limited to the following:

(a) Counsel failed to conduct an adequate pretrial investigation into the State's case and defenses available to Petitioner.

(b) Counsel failed to file several motions pretrial to protect Petitioner's right to a fair trial.

(c) Counsel failed to conduct an adequate examination of potential jurors to ensure that Petitioner received a fair and impartial jury. Counsel also failed to

object to the sitting of several venirepersons who could not impartially determine Petitioner's guilt or the appropriate punishment in this case.

(d) Counsel failed to confront adequately the State's case during the guilt phase of trial.

(e) Counsel failed to object to the admission of several items of evidence offered by the State during the guilt phase of trial. Timely objections would have insured that certain improper evidence was not received and considered by the jury.

(f) Counsel failed to appropriately object to the improper closing argument of the prosecution at the conclusion of the guilt phase of trial.

(g) Counsel failed to give closing argument at the conclusion of the guilt phase which adequately exposed the shortcomings of the State's case against Petitioner.

(h) Counsel failed to raise the proper objections to improper charges given by the trial court to the jury at the conclusion of the guilt phase of trial.

(i) Counsel failed to object properly to items of improper evidence offered by the State in aggravation at the penalty phase of trial.

(j) Counsel failed to conduct an adequate pretrial investigation into Petitioner's life and background to uncover and present to the jury evidence in mitigation. As a result, the jury failed to hear compelling evidence in mitigation of sentence.

(k) Counsel failed to object properly to misleading and improper arguments made by the prosecution during its penalty phase summation to the jury.

(l) Counsel failed to object to those portions of the trial court's charge which failed to adequately define mitigating circumstances and misled the jury in other ways.

3. But for counsel's ineffective representation, there is a reasonable probability that the result of each phase of trial, and the appeal, would have been different.

CLAIM II

MISCONDUCT BY THE PROSECUTION TEAM DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, IN VIOLATION OF ART. I, § 1, ¶¶ 1, 2, 11, 12, 14 & 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Claim is evidenced by the following facts:

1. All other allegations in this Petition are incorporated into this Claim by specific reference.

2. Petitioner's rights to due process and a fair trial were violated by prejudicial remarks by the prosecution in its opening statement to the jury, in contravention of Art. I, § 1, ¶¶ 1, 11, & 17 of the Constitution of the State of Georgia, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

3. Petitioner's rights to a fair trial and to due process were violated when the state's improper and highly prejudicial argument at the close of the guilt/innocence phase.

4. Petitioner's rights under Art. I, § 1, ¶¶ 1, 11, & 17 of the Constitution of the State of Georgia and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated by the prosecutor's prejudicial and improper closing argument at the sentencing phase of the trial.

5. The prosecution team failed to disclose to Petitioner evidence in its possession which was material, and exculpatory or favorable to Petitioner on issues of guilt and/or punishment, in violation of his rights under Art. I, § 1, ¶¶ 1, 2, 11, 14 & 17 of the Constitution of the State of Georgia, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *Brady v. Maryland*, 373 U.S. 83 (1963).

CLAIM III

PETITIONER WAS TRIED UNDER GEORGIA'S UNIFIED APPEAL PROCEDURE, WHICH IS UNCONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED IN PETITIONER'S CASE, IN VIOLATION OF PETITIONER'S RIGHTS UNDER ART. I, § 1, ¶¶ 1, 2, 11, 12, 14 & 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA, AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This claim is evidenced by the following facts:

1. All other allegations in this Petition are incorporated into this claim by specific reference.

2. On its face and as applied to Petitioner's case, O.C.G.A. § 17-10-36 (Unified Appeal Procedure) denied Petitioner his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

3. The Unified Appeal Procedure (hereinafter "UAP") requires that the trial court hold "conferences" with the defendant, defense counsel, and the prosecutor at various stages throughout the course of a capital case. At each conference, the court inquires of defense counsel whether he or she will raise various issues at that particular stage of the proceeding, and further inquires of the defendant whether he or she waives issues which have been discussed and not raised. The prosecutor is present at each conference. For the reasons set forth below, this procedure violates the constitutional rights of criminal defendants, and did so in Petitioner's case.

4. The UAP violates important due process considerations in the following respects. First, it upsets the balance of power between the State and the accused in the adversarial system by forcing the defense, throughout the proceedings, to disclose strategy and tactics. This allows the State to learn at various junctures in the case the intentions of the defense, without itself having to disclose any information. In Petitioner's trial, counsel and Petitioner proceeded under this novel system, and regularly disclosed to the court, in the presence of the State, defense plans and issues the defense would or would not be raising.

5. The UAP also violates a defendant's right to silence. When represented by counsel, a criminal defendant enjoys the right to be heard through counsel. Under the UAP, this right is not honored, as repeated inquiries are made of the defendant about strategy and satisfaction with counsel. At Petitioner's trial, the court repeatedly inquired of him regarding whether he was satisfied with his attorney and his acquiescence to counsel's failure to raise various issues in the case.

6. The UAP violates the right to counsel in at least three respects. By requiring the trial court to regularly ask defense counsel which issues he will or will not be raising, it necessarily results in a disclosure of counsel's strategy in violation of the work product privilege. This occurred several times during Petitioner's trial. Second, the procedure calls upon the defendant at each conference to inform the court whether he is satisfied with the performance of defense counsel. Assessment of counsel's performance during trial is an impossible task for a lay person, especially one is also under the strain of trial as the defendant. Furthermore, the UAP does not provide the defendant with independent counsel to assist him in making this important judgment. Third, the UAP thrusts the court directly into the attorney-client relationship and requires counsel to advise the defendant of issues which have little, if any, relevance to the case. This takes away from time better spent by the defendant and defense counsel pursuing relevant issues.

7. The UAP also denies a capital defendant his right to equal protection under the laws. For no rational reason, the UAP imposes the numerous above-cited costs only on capital defendants.

8. Because the UAP violates a capital defendant's rights in so many ways, the reliability of a trial and sentencing hearing held pursuant to the UAP is diminished. The capital defendant is no longer afforded the basic right to be tried in a fundamentally fair proceeding. Because Petitioner was tried and convicted pursuant to this procedure, he was denied minimal fairness and the reliability essential in capital cases.

IV. PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays that this Court:

1. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint, and/or be relieved of his unconstitutional sentence of death;

2. Conduct a hearing at which proof may be offered concerning the allegations of this petition;

3. Permit Petitioner, who is indigent, to proceed *in forma pauperis*, and grant Petitioner sufficient funds to secure the expert testimony necessary to prove the facts as alleged in this petition;

4. Grant Petitioner the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in this petition;

5. Allow Petitioner a period of sixty (60) days, which period shall commence after the completion of any hearing this Court shall determine to conduct, in which to brief the issues of law raised by this petition;

6. Stay Petitioner's execution pending final disposition of this petition;

7. Grant such other relief as may be appropriate.

Respectfully submitted,

/s/ EL GIBSON
EXZAVIOUS LEE GIBSON
Petitioner

Appendix A

GEORGIA RESOURCE CENTER

1375 Peachtree Street, N.E., Suite 276
Atlanta, Georgia 30309

FAX: (404) 898-2074 *(404) 898-2060*

December 12, 1995 BY HAND

Justice Norman Fletcher
Supreme Court of Georgia
State Judicial Building
Room 527
Atlanta, Georgia 30334

Re: Recruitment of volunteer attorneys in capital cases.

Dear Justice Fletcher:

On November 30, 1995, I met with you, Elizabeth Wells, Stephen Bayliss and Robert Remar to discuss the need for "volunteer" attorneys to represent capitally sentenced inmates in post-conviction proceedings. At this meeting, we discussed the increasing difficulties the Resource Center is encountering in recruiting counsel, and the role this Court has traditionally played in the recruitment of counsel in capital cases.

In the past, this Court has assisted the Resource Center in locating counsel, and has appointed Georgia law firms to represent death sentenced inmates in their post-conviction proceedings. We believe that similar assistance from this Court now will be instrumental in insuring that volunteer counsel are located.

We also discussed recent funding cuts suffered by the Resource Center which have forced the Resource Center

to lay off the majority of its staff, increasing the need for volunteer counsel. As currently funded, the Resource Center cannot handle its current caseload, much less the never ending flow of new cases in the state habeas process. With the reduced staff of two attorneys, one investigator, and one administrator, the Resource Center is no longer be [sic] able to provide direct representation to inmates seeking post-conviction relief and is unable to continue the role that it has assumed in representing Georgia's death-sentenced inmates without the assistance of volunteer counsel.

The Resource Center believes that recruitment of volunteer counsel is worth the effort, both in terms of effectiveness and efficiency. Habeas cases will not move through the process without attorneys, because death-sentenced inmates cannot reasonably be expected to investigate, prepare, and litigate their own habeas petitions. Insuring that all new inmates coming into the state habeas process are represented by competent counsel is a goal that we believe can be achieved through the combined efforts of the Resource Center, this Court and the private bar.

The Resource Center is presently seeking counsel for twenty inmates in state court. These men, all under sentence of death, are in immediate need of legal representation.

The Resource Center proposes that this Court agree to send a letter to law firms in Georgia with twenty or more members requesting that they either assume the responsibility for a capital case in post-conviction, or in the alternative, that they agree to provide financial assistance to the Resource Center that could be used in the litigation

of a capital case in post conviction. The first alternative will allow counsel who are in a position to directly represent an inmate the opportunity to do just that. The second alternative will allow counsel who wish to assist in a capital habeas proceeding but are not presently in a position to directly represent an inmate the opportunity to insure that these inmates receive adequate resources with which to litigate their cases. This second option may be a reasonable choice for large firms who have the financial means to handle a capital habeas, but who do not feel they have the necessary expertise. These much needed resources would provide funds to allow sole practitioners or attorneys from smaller firms willing to represent death sentenced inmates to do so without adverse financial impact. These alternatives will allow members of the Georgia bar an opportunity to provide pro bono services to one of the neediest segments of the prison population, in the finest tradition of the bar.

The Resource Center can provide the Court with a list of suitable firms in Georgia, a list of inmates requiring counsel and a draft letter to be sent to the law firms if the Court so requires.

Thank you for your assistance in this important matter.

Sincerely,

/s/
Stephen Kinnard
Chair, Board of Directors
Georgia Resource Center

GEORGIA RESOURCE CENTER

1375 Peachtree Street, N.E., Suite 276
Atlanta, Georgia 30309

FAX: (404) 898-2074 *(404) 898-2060*

November 8, 1995 BY HAND

Chief Justice Robert O. Benham
Supreme Court of Georgia
State Judicial Building
Room 507
Atlanta, Georgia 30334

Re: Recruitment of volunteer attorneys in capital cases.

Dear Chief Justice Benham,

I am writing to request assistance in the recruitment of volunteer attorneys for the litigation of capital collateral cases.

Since its inception in 1988, the Georgia Appellate and Educational Resource Center (hereinafter Resource Center) has endeavored to provide representation for all inmates under sentence of death in Georgia. Through its efforts, the Resource Center has ensured efficient and expedited review and resolution of many cases.

The Resource Center has traditionally relied upon volunteer attorneys to assume some of the responsibility and expense for litigating habeas cases. Unfortunately, recent efforts to recruit volunteer attorneys has been unsuccessful, and the Resource Center is now representing the majority of its clients directly without the assistance of volunteer counsel. But due to a loss of funds and staff at the Resource Center, the need for volunteer attorneys to

represent these death-sentenced individuals has increased.

As you are aware, the Resource Center recently suffered the loss of all of its federal funds, which represented approximately 70% of its operating budget. With the loss of funds, the Resource Center was forced to lay off ten members of its fourteen member staff. The remaining two attorneys, one investigator and one administrator have inherited the entire caseload of the former office. But this greatly reduced staff at the Resource Center cannot ensure that all death sentenced inmates receive adequate representation in post-conviction, thus the need for volunteer attorneys is greater now than it has been in many years.

The Resource Center is the most effective way to meet the challenges of capital post-conviction representation and to ensure the efficient review of these cases. But with the financial limitations the Center is now operating under it cannot continue to meet these challenges without the assistance of volunteer counsel.

With this background, I am requesting an opportunity to meet with you to discuss this need for additional volunteers to represent death sentenced inmates. In the past, this Court has assisted the Resource Center in locating counsel, and has appointed Georgia law firms to represent death-sentenced inmates in their state post-conviction proceedings. I would welcome an opportunity to discuss with you the continued support of the Court in the recruitment of volunteer counsel.

Please contact me at your earliest convenience.

Sincerely,

/s/
Stephen Kinnard
Chairman of the Board of Directors

Appendix B

[Seal]

Supreme Court
State of Georgia
STATE JUDICIAL BUILDING
Atlanta 30334

[Names Omitted In Printing]

Stephen O. Kinnard
Appellate Conference Office
11th Circuit U. S. Court of Appeals
56 Forsyth Street
Atlanta, Georgia 30303

Dear Mr. Kinnard:

The Court has directed me to notify you that it has approved proposed Uniform Superior Court Rule 44, dealing with death penalty habeas corpus.

A copy of the order is attached.

The Court will take up your letter regarding the Georgia Resource Center at Administrative Banc in January.

Sincerely,

/s/ Sherie M. Welch
Sherie M. Welch, Clerk

Enclosure

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON, Petitioner, v. ALBERT G. THOMAS, Warden, Georgia Diagnostic and Classification Center, Respondent.	HABEAS CORPUS No. _____

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the foregoing pleading upon Respondent by mail, first class postage affixed, addressed as follows:

Mary Beth Westmoreland
Assistant Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

This 20th day of December, 1995.

/s/ EL Gibson
EXZAVIOUS LEE GIBSON

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXAVIOUS GIBSON, EF-261140 Petitioner, v. A. G. THOMAS, Warden, Georgia Diagnostic and Classification Center, Respondent.	} Civil Action No. 95-V-648 } Habeas Corpus

RESPONDENT'S MOTION FOR ENTRY OF A SCHEDULING ORDER

COMES NOW A. G. Thomas, Warden, Respondent in the above-referenced civil action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and moves this Court for the entry of scheduling order adopting the time tables and guidelines of Uniform Superior Court Rule 44. This motion is made for the reasons articulated in the accompanying brief.

Respectfully submitted,

Michael J. Bowers
Attorney General
Georgia Bar No. 071650

/s/ Susan V. Boleyn (MHH)
Susan V. Boleyn
Senior Assistant Attorney General
Georgia Bar No. 065850

/s/ Mary H. Hines
Mary H. Hines
Special Assistant Attorney General
Georgia Bar No. 356080

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXAVIOUS GIBSON, EF-261140 Petitioner, v. A. G. THOMAS, Warden, Georgia Diagnostic and Classification Center, Respondent.	}	Civil Action No. 95-V-648 Habeas Corpus

BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR THE ENTRY OF A SCHEDULING ORDER

Respondent submits this brief in support of his motion, asking that the Court exercise it's inherent discretion to control the orderly progress of litigation pending before it by issuing a scheduling order adopting the guidelines and time tables contained in Uniform Superior Court Rule 44. While the instant petition was filed before Rule 44 became effective, Respondent submits that implementing the Rule in the form of a scheduling order at the outset of this litigation will facilitate a fair and orderly resolution of the issues presented in this habeas corpus action.

ARGUMENT AND CITATION OF AUTHORITY

On December 20, 1995, petitioner filed what purports to be a *pro se* Petition for habeas corpus relief. Petitioner has, by virtue of his petition, raised several issues that

strongly suggest a scheduling order would be appropriate under the circumstances.

The entry of a pre-trial order will ensure the existence of a procedural framework within which fundamental threshold issues may be timely and orderly resolved. These include whether claims or issues are barred from review upon habeas corpus under the principals of res judicata and procedural default. Also, a pre-trial order will fix the time during which amendments and motions may be filed. Addressing these matters prior to an evidentiary hearing will assist the court and the parties in determining in advance the scope of the evidentiary hearing so that all may prepare appropriately.

Additionally, a scheduling order will protect the parties' interests by providing notice of the expected progression of the case. It will prevent the delay filing of lengthy amendments which prejudice the Respondent's ability to make a timely response. It has become common practice for petitioners, even those represented by counsel, to file numerous amendments to petitions, frequently on the day of hearing or shortly prior to a hearing. This practice creates a situation which necessitates a request for a continuance, which in turn wastes the time and resources of the court, the respondent, and the witnesses who have been subpoenaed from across the state.

Finally, the adoption of the proposed scheduling order will not prejudice the petitioner. As provided in Uniform Superior Court Rule 44.5, the petitioner may always, for good cause shown, request the court to modify the time periods set forth in the scheduling order.

CONCLUSION

For these reasons, respondent prays that this court issue a scheduling order adopting Uniform Superior Court Rule 44, subparts 44.1 through 44.13.

Respectfully submitted,

Michael J. Bowers
Attorney General
Georgia Bar No. 071650

/s/ Susan V. Boleyn (MHH)
Susan B. Boleyn
Senior Assistant Attorney General
Georgia Bar No. 065850

/s/ Mary H. Hines
Mary H. Hines
Special Assistant Attorney General
Georgia Bar No. 356080

Please serve:

Mary H. Hines
DREW, ECKL & FARNHAM
P.O. Box 7600
880 West Peachtree Street
Atlanta, Georgia 30357
(404) 885-6226

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Return and Answer [sic], prior to filing the same, by United States mail, properly addressed, upon:

Exavious L. Gibson
EF 261140
Georgia Diagnostic and Classification Center
P.O. Box 3877
Jackson, GA 30223

Georgia Resource Center
1375 Peachtree Street, N.E.
Suite 276
Atlanta, Georgia 30309

Honorable Timothy G. Vaughn
District Attorney
Oconee Judicial Circuit
P.O. Box 1027
Eastman, Georgia 31023-1027

Honorable J. Carlisle Overstreet
Judge Superior Court
Augusta Judicial Cuircuit [sic]
305 City-County Building
530 Greene Street
Augusta, GA 30911

This 1st day of February, 1996.

/s/ Mary H. Hines
Mary H. Hines
Special Assistant Attorney General

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

CIVIL ACTION NO. 95-V-648

EXAVIOUS GIBSON, EF-261140 vs. A. G. THOMPSON, Warden, Georgia Diagnostic and Classification Center,	)))))))	HABEAS CORPUS (Filed Feb. 12, 1996)

SCHEDULING ORDER

In order to control the orderly progress of the above styled litigation and to facilitate a fair and orderly resolution of the issues presented in this action, the Court hereby and in accordance with the guidelines set forth in Superior Court Rule 44, establishes the following specific dates.

The petitioner has until Monday, February 18, 1996 to file pretrial motions. The respondent has until Tuesday, March 19, 1996 to file any pretrial motions. Responses to motions shall be governed by Uniform Superior Court Rule 6.2. No later than Thursday, April 18, 1996, Petitioner may amend his petition.

The Court reserves the right to shorten any time period set forth above and may extend such time period for good cause.

SO ORDERED, this 8th day of February, 1996.

/s/ J. Carlisle Overstreet
J. Carlisle Overstreet
Judge, Superior Court
Augusta Judicial Circuit

CERTIFICATE OF SERVICE

I do hereby certify that on this day and prior to filing I served a copy of the within and foregoing ORDER upon the following:

Exavious L. Gibson, EF-261140
Georgia Diagnostic and Classification Center
Post Office Box 3877
Jackson, Georgia 30223

Georgia Resource Center
1375 Peachtree Street, N.E.
Suite 276
Atlanta, Georgia 30309

Timothy G. Vaughn
District Attorney
Oconee Judicial Circuit
Post Office Box 1027
Eastman, Georgia 31023-1027

Mary H. Hines
DREW, ECKL & FARNHAM
Post Office Box 7600
Atlanta, Georgia 30357

by mailing a copy thereto in a properly addressed envelope with adequate postage affixed thereon to assure delivery.

This 8th day of February, 1996.

/s/ J. Carlisle Overstreet
J. Carlisle Overtreet [sic]
Judge, Superior Court
Augusta Judicial Circuit

36073, 36074, STATE OF GEORGIA et al. v. DAVIS; and vice versa.

BOWLES, Justice.

Curfew Davis, hereinafter petitioner, is an inmate at the Georgia State Prison at Reidsville under death sentence for murder. He filed a complaint in Tattnall Superior Court seeking appointment of counsel to represent him in a habeas action and also seeking funds to hire investigators, pay expert witnesses, and pay litigation expenses. He originally named only the State of Georgia and Charles Balkcom, Warden, as defendants but later amended to include the Commissioners of both Troup[1] and Tattnall Counties as defendants. It is petitioner's contention that either the State or one of its political subdivisions is required to furnish him counsel and other financial assistance so that he can have a "meaningful opportunity to present his claims in a state habeas corpus proceeding." He alleges that the Superior Court of Butts County has held that indigent death row inmates must be provided with appointed counsel in state habeas proceedings and that equal protection requires that Tattnall County do the same. The trial court below dismissed all parties defendant from the case except the State of Georgia and Charles Balkcom, Warden. The court then appointed the Prisoner Legal Counseling Project, an organization funded by the State of Georgia, to examine petitioner's case and to represent him on habeas if it were determined that such a proceeding would be meritorious. In its order, the trial court recognized that this court has previously held that habeas corpus petitioners are not

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[1] Davis was convicted and sentenced in Troup County.

entitled to appointed counsel. It based its decision on an order entered in Butts County Superior Court requiring that counsel be appointed in death cases, finding that equal protection required the same treatment for inmates on death row in Tattnall County.

We reverse.

This court has repeatedly held that indigent habeas petitioners are not entitled to appointed counsel. *Pulliam v. Balkcom,* 245 Ga. 99 (2) (263 SE2d 123) (1980); *Harris v. Hopper,* 243 Ga. 244 (6) (253 SE2d 707) (1979); *Spencer v. Hopper,* 243 Ga. 532 (2) (255 SE2d 1) (1979); *McClure v. Hopper,* 234 Ga. 45 (6) (214 SE2d 503) (1975). Public funds are already provided for appointed counsel to represent indigent defendants at their trials and on their appeals as of right. However, we know of no statute, case, or constitutional provision which would permit a trial judge to appoint counsel to a habeas petitioner, to be paid out of state or county funds.

Petitioner contends that he is entitled to meaningful access to the courts and that, in his case, to have meaningful access, he must have appointed counsel and funds. He relies primarily on the United States Supreme Court case of Bounds v. Smith, 430 U.S. 817 (97 SC 1491, 52 LE2d 72) (1977).[2] In Bounds, the Supreme Court held, " . . . the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing

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[2] This court has already held that Bounds does not require the State to pay a petitioner's expenses in habeas corpus proceedings. See *Harris v. Hopper,* supra, at 245.

prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828. The court did not hold that meaningful access required providing funds or appointing counsel to indigent habeas petitioners and we decline to extend the holding to so require.

A compelling argument can be made that we simply hold that counsel may be appointed to indigent death row habeas petitioners just because of the irrevocability of death. But if meaningful access to the courts means appointed counsel, are not *all* indigent habeas petitioners entitled to meaningful access to the courts and therefore appointed counsel? Would not equal protection require that all indigents receive appointed counsel? And when should such counsel be appointed? Taken to its logical extreme, petitioner's argument would require that counsel be assigned as soon as each inmate gets to his or her cell. Only then could we be sure that those indigents without enough intelligence to ask for an attorney were getting "meaningful access to the courts," as claimed by petitioner.

Even assuming we might hold that indigent death row habeas petitioners were entitled to appointed counsel, petitioner's argument goes further to require us to also provide funds for investigation, etc. The argument is that without funds to investigate and obtain facts to prove his case, petitioner is denied "meaningful access to the courts," as surely as if he never had an attorney. Though " . . . the cost of protecting a constitutional right cannot justify its total denial," "[t]his is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful

access." Bounds, supra, at 825. Testimony in this case shows that the Prisoner Legal Counseling Project already visits each prison every month to interview prisoners, give legal advice, and initiate court action in meritorious cases. It is neither necessary or desirable to appoint the Project to any given case and by appointing it to *all* death cases, for example, it may become hampered in dealing with meritorious cases of other kinds.

Because we today reaffirm our previous holdings that indigent habeas petitioners are not entitled to appointed counsel, petitioner's appeal from the dismissal of defendant county commissioners is moot.

Judgment in Case No. 36073 reversed. All the Justices concur, except Hill, J., who dissents. Appeal in Case No. 36074 dismissed. All the Justices concur.

ARGUED APRIL 14, 1980 – DECIDED JULY 16, 1980 – REHEARING DENIED JULY 30, 1980 IN CASE No. 36074.

Habeas corpus proceeding. Tattnall Superior Court. Before Judge Harvey.

Arthur K. Bolton, Attorney General, Harrison Kohler, Assistant Attorney General, for appellants. (Case No. 36073).

Millard C. Farmer, Jr., Joseph Nursey, Andrea I. Young, for Davis.

Arthur K. Bolton, Attorney General, Harrison Kohler, Assistant Attorney General, Jerry Willis, M. Francis Stubbs, for appellee (Case No. 36074).

HILL, Justice, dissenting.

I would affirm the order of the trial court. It is true that indigent habeas corpus petitioners are not entitled to appointed counsel as a matter of right. *Pulliam v. Balkcom*, supra, 245 Ga. at 100; *Spencer v. Hopper*, supra, 243 Ga. at 537; *McClure v. Hopper*, supra, 234 Ga. at 50.

However, none of our cases hold that a habeas corpus court lacks the authority to appoint counsel for an indigent habeas petitioner in the exercise of its discretion. That is what the trial court did here. The court appointed the PLCP to examine petitioner's case and to represent him on habeas if the PLCP determined that such a proceeding would be meritorious. That is not appointment of counsel as of right; it is an exercise of discretion. There being no showing of abuse of discretion, I would affirm the trial court.

Respondent's Exhibit 1

CENTRAL STATE HOSPITAL

Milledgeville **Georgia 31062**

[LOGO] [LOGO] [LOGO]

May 10, 1990

The Honorable Phillip R. West
Judge, Superior Courts
Oconee Judicial Circuit
P.O. Box 571
Eastman, Georgia 31023

Re: Exzavious L. Gibson
Case No: 262-344
Dodge County
Binion 2 South

Dear Judge West:

Mr. Exzavious L. Gibson of your jurisdiction was admitted to the Forensic Services Division of Central State Hospital on April 18, 1990, pursuant to your order for pretrial psychiatric evaluation. Your order, which charges Mr. Gibson with armed robbery and murder, calls for our assessment of his competency for trial, criminal responsibility, and recommendations for disposition. Before beginning the evaluation process, Mr. Gibson was informed of his rights and of the possible uses of the information obtained.

Mr. Gibson is charged with the murder of an Eastman, Georgia resident on or about February 2, 1990. He is charged with stabbing the victim to death. Because of the nature of the crime, the state has decided to seek the death penalty.

Central State Hospital Police RAP Sheet indicates that Mr. Gibson has had several prior encounters with the

law. According to the sheet, he was charged with theft and assault in Maryland in 1989, it also indicates that he has been charged with a number of other crimes in Florida. Throughout his childhood and adolescent years, Mr. Gibson has been in one institution or another, seemingly for the majority of his life. It is clear to this examiner that, by history, Mr. Gibson is currently on an antisocial continuum of behavior.

Psychological testing indicates that Mr. Gibson functions within the average range of general intelligence. Psychological testing revealed possible malingering, or exaggeration of existing problems. No psychotic symptoms were noted throughout the testing and interview sessions and Mr. Gibson was in good contact with reality as he has been throughout his hospitalization.

Mr. Gibson has been cooperative throughout the evaluation process. He has not revealed any details of the incident which led to his arrest beyond statements he made to the police when he was arrested. We see no reason why he is not able to cooperate with counsel in his own defense. He understands the charges against him, he understands that he has a lawyer, Mr. Dennis Mullis, and he understands that he could be sentenced to the electric chair if convicted.

I find no evidence of a disorder of thought or mood that would impair his ability to distinguish right from wrong or legality from illegality. I find no evidence of a delusional compulsion. Beyond the fact that Mr. Gibson's upbringing, has pointed him in the direction of the development of an antisocial personality disorder, I see no particular mitigating factors in this case.

We will be returning Mr. Gibson to your jurisdiction to await disposition of his charges. I consider Mr. Gibson to be dangerous and to be a possible escape risk. Therefore, the authorities should be alert and vigilant concerning possible escape behavior.

Thank you for this opportunity to be of assistance to your court. If I can clarify any of the information in this report or be of assistance in any other way, please contact me at 912-453-4281 or write to me at the above address.

Sincerely,

/s/ Robert J. Storms, Ph.D.
Robert J. Storms, Ph.D.
Senior Psychologist
Forensic Services Division

RJS:id

cc: Mr. Tim Vaughn
Mr. Dennis Mullis

Respondent's Exhibit 2A

GEORGE T. ANDERSON, PH.D.
CLINICAL PSYCHOLOGIST
DUBLIN, GEORGIA 31040-0889

P.O. BOX 889 PHONE 272-5586

May 29, 1990

Mr. Dennis Mullis
Attorney at Law
P. O. Box 429
Cochran, Georgia 31014

Dear Mr. Mullis:

At your request I have gone to the Dodge County Jail to see your client, Exzavious Gibson. The officials there made an adequate room available to me for the evaluation and this has been carried out. The results of the evaluation are included in my enclosed report. In my opinion, the client is able to cooperate with counsel in his defense. From a psychological point of view, I find no reason why he could not stand trial. If after reading the report you have additional questions, please feel free to contact me.

I certainly appreciate the referral.

Sincerely,

/s/ George T. Anderson
George T. Anderson, Ph. D.
Clinical Psychologist

GTA:bjd
Enclosure

GEORGE T. ANDERSON, PH.D.
CLINICAL PSYCHOLOGIST
DUBLIN, GEORGIA 31040-0889

P.O. BOX 889 PHONE 272-5586

CONFIDENTIAL
PSYCHOLOGICAL EVALUATION

Name: Exzavious Gibson
Date of Evaluation: May 28, 1990
Date of Birth: March 31, 1972
Age of Evaluation: 18 years

Tests Administered:

Wechsler Adult Intelligence Scale-Revised
Wide Range Achievement Test-Revised
Bender-Gestalt
Projective Drawings
Rorschach
Mini Mult

BACKGROUND INFORMATION:

This 18 year old, black, single male was seen on referral from his attorney, Mr. Dennis Mullis. The client was seen in the Dodge County Jail.

Background information provided to me indicates that the client has been indicted for murder and is soon to go on trial. He has been evaluated by the Forensic Team at the Binion Building at Central State Hospital and a second opinion was requested.

CURRENT HISTORY:

The client was seen in the jail at Dodge County where an adequate examining office was made available. He was wearing leg chains but no handcuffs. Therefore, he was free to manipulate the test materials properly. The client

did not make good rapport with this examiner, did not make eye contact, did not seem at all interested in the test procedures even after the importance was explained to him.

The client indicates that he as brought up in the State of Maryland by an aunt after his mother died when he was two (2) years of age. He went to Florida and lived in the Jacksonville area for several months, spent two and a half (2½) months in jail there before coming to the Eastman, Georgia area where he has been since January of 1990. He states he went to school as far as the ninth grade in regular classes, was retained in the eighth grade and quit going. He is not married, does not have children.

The client does not report any history of surgery, does report some minor head injures [sic], does not report seizures, does not report any current medications.

He has not been in the military service. He states he has done some construction work and some work in fast food restaurants. He has not worked any in the last year or so.

He was seen at Central State Hospital where he stayed about a month and this is the only time he has ever been hospitalized in any sort of psychiatric facility. Prior to being confined he did report drinking alcoholic beverages, states he drank whatever he could get. He states he has used drugs, did not remember what kind but has used especially what he called "coke and weed". When ask [sic] about his prior court appearances, the client was quite vague but states he has not been sent to prison previously. He states he has been in trouble with the law before for trespassing, disorderly conduct, breaking and entering, attempted arson and "a bunch of other stuff".

He states he was put in a juvenile home once as a juvenile, spent two and a half ($2^1/_2$) months in jail in Florida but this is the longest he has ever been locked up at any one time. He has not been sent to an adult prison. He was very reluctant to talk about this area.

The client does not report any physical health problems. He is able to take care of such self-help skills as feeding, dressing and bathing himself. He can tell time, did not know the exact day of the month although he knew the year and month. He does not have a driver's license. He does not report any difficulties with vision nor hearing. His speech is clear but he does not volunteer much information, is very quiet.

Concerning his background, he states his mother died when he was two (2) years old, he lived with an aunt in Maryland, lived with another aunt in Eastman, lived alone in Florida. He states he has never had any contact with his father and does not have brothers or sisters.

PSYCHOLOGICAL TESTS RESULTS:

On the Wechsler Adult Intelligence Scale-Revised, Exzavious Gibson attained a Verbal IQ of 78, Performance IQ of 76, resulting in a Full Scale IQ score of 76. This would place him in the Borderline Range of intelligence with the following scaled scores reported.

Verbal		Performance	
Information	4	Picture Completion	4
Digit Span	8	Picture Arrangement	7
Vocabulary	7	Block Design	7

Arithmetic	6	Object Assembly	7
Comprehension	2	Digit Symbol	7
Similarities	7		

We see clearly the most unusual feature of the test is the very low score on Comprehension. This scale measures common sense judgements and indicates that the client is quite weak in this area.

The Wide Range Achievement Test-Revised shows:

	GRADE EQUIVALENT	STANDARD SCORE	CENTILE
Reading	9E	91	27
Arithmetic	5E	68	2.0

The client seemed to just quit on the arithmetic section, likely could have done better. In general, he did not seem to put forth his best effort on the tests, did a lot of deep breathing and wanted to take a break and quit doing the tests, obviously did not want to do them. As a result it is not felt that the scores represent his best effort, he probably has a little more ability than the above reported scores state.

The figures of the Bender-Gestalt are drawn legibly, recognizably and on one page. There is no rotation, no perseveration, no distortion. He does reduce the designs in size and reduces designs 1 and 2 in number. The scoring would be in the Borderline Range. Overall the figures do not represent impairment in visual motor coordination.

Projective Drawings show a bare compliance with instructions. They suggest an individual who is angry, hostile and suspicious.

The Mini-Mult indicates that the client probably exaggerate his symptoms. The Validity Scales show show [sic] a peak on F scale which is normally seen in individuals who exaggerated their symptoms. To the degree that the evaluation on this test could be considered valid it would show scales 4, 8, and 2 elevated above the critical levels in that order followed by scales 6 and 1 that reached the critical range. Scales 3, 9, and 7 are just below the critical range. Individuals with this pattern are stated to be depressed, tense, irritable, to distrust people, to keep people at a distance and to have a good deal of hostility. It is common for juvenile delinquents to demonstrate this pattern. Individuals with this pattern are frequently found to be unpredictable and impulsive. They do not develop close relationships with people and tend to distrust others. The [sic] frequently get into trouble because of their poor judgement and demonstrate some antisocial features. Individuals with this pattern who commit crimes are frequently found to carry out crimes that are poorly planned and poorly executed.

He was able to give scorable responses to all of the Rorschach pictures. Some unusual responses are noted including some that would suggest anger, frustration, as well as some depressed mood. One quite unusual response is noted but overall the figures would not be felt to demonstrate bizarre ideation.

PSYCHOLOGICAL ASSESSMENT:

We see then an individual who scores in the Borderline Range of intelligence, who likely has more intellectual potential than this. He did not seem to be putting forth his best effort on the testing, did not seem to be well motivated despite the importance the testing was to him. He maintained a rather distance manner with this examiner, was rather glib and superficial. He barely complied with the test instructions in some instances and could not be thought of as being particularly cooperative. The only hospitalization he reports was a court ordered evaluation at Central State Hospital. He has not been treated as an outpatient for psychological problems, does give a history of some alcohol and drug abuse when he was on the streets. Looking at the Carpenter, Strauss and Bartko signs of schizophrenia, the client does not meet this criteria. He gives some vague auditory experiences which do not sound at all like true hallucinations. He does not report any delusional thinking at all. He has had some feelings of alienation most particularly since he has been arrested. He does report some restriction of affect likewise since he has been arrested. He does not report any suicidal thoughts, plans nor attempts at any point in his life.

CURRENT MENTAL STATUS:

The client is alert, a little tense, appears his stated age. His behavior seemed to be a little inappropriate and distant. He seemed to be somewhat withdrawn, preoccupied with his own thoughts, quite guarded. His

behavior in the past seems to have been more impulsive and manipulative. His speech is not spontaneous, generally is clear, coherent, reflecting something of a lower socio-cultural background. His thought processes do not indicate delusions nor hallucinations. He does report some fear of spiders but only when specifically ask [sic]. His emotional level does appear somewhat constricted, his mood somewhat depressed. He is not completely correctly oriented in time, although this likely is the function of incarceration. He does not report any difficulties with memory but certainly has a rather convenient memory. He does not show good insight into the psychological component to his problem.

In discussing with the client the upcoming trial, I talked to him about the roles of various people in the court room setting. He understands the charges against him, he understands the seriousness of the situation, he understands the roles of the Defense Attorney, District Attorney, Judge and Jury. He is felt to be capable of cooperating with counsel in his own defense.

From a psychological point of view, I find no reason why he could not be ready to stand trial. Certainly, an arrest, incarceration and trial are all upsetting and would be to any person. He may experience some emotional reaction to the whole process which would be considered a normal reaction.

DIAGNOSIS DSM III REVISED:

Axis I: Alcohol abuse in remission while confined Code 305.00

Psychoactive substance abuse NOS in remission while confined Code 305.90 (primarily cocaine and marijuana)

Adjustment disorder with depressed mood Code 309.00

Axis II: Antisocial personality disorder Code 301.70 (Major Diagnosis)

Borderline intellectual functioning V40.00

Axis III: No Diagnosis by Client History

Axis IV: Severity of psychosocial stressors Code 4 – Severe (confinement)

Axis V: Global assessment of functioning scale 50

/s/ George T. Anderson
George T. Anderson, Ph. D.
Clinical Psychologist

GTA:bjd

Respondent's Exhibit 2B

INTERVIEW WITH DR. GEORGE ANDERSON

Dr. Anderson is a clinical psychologist who examined Exzavious Lee Gibson most recently.

This interview occurred on June 2, 1990, at 10 A.M.

Q.: Phone ringing.

A.: Hello. This is Dr. Anderson. How are you?

Q.: Fine. You got a minute?

A.: I'm fixing to start with somebody but go ahead.

Q.: Well, I just want to talk to you about the results on Exzavious Gibson.

A.: Right.

Q.: Uh, There were a couple of things. You. In there you described him on a couple of occasions as borderline in intelligence. What does that signify to you?

A.: Actually, he's brighter than that, but that's how he scored. He just didn't have any motivation. He wasn't, to me, he just didn't act like he cared one way or the other.

Q.: Yea?

A.: He's, he's about a half a peg below average. He's certainly not retarded.

Q.: There is no question in your mind that he is not retarded?

A.: Right.

Q.: O.k. Well, that's what I wanted to know then. Uh, let's see. Was there anything else I wanted to ask? O.k. So, you feel like that he just did not try on the test, is that correct?

A.: Well, he put forth, you know, a little effort, but he, he didn't. In other words if he had been applying for a job, he would of worked on it a lot harder.

Q.: Yea, ~~yea~~.

A.: He, he's not retarded. He probably really is, oh, a few points, at least five or six points, higher than what he actually tested, but he tested in the borderline range which is. He's clearly not retarded.

Q.: O.k. Well, that's what I wanted to know. I certainly appreciate your help.

A.: Well, I'm not much help on that case I know.

Q.: Well, you can't change what you got to work with. Neither can I.

A.: I know.

Q.: All right. Thanks a lot. Bye.

A.: O.k.

Respondent's Exhibit 2C

TELEPHONE INTERVIEW WITH
DR. ROBERT STORMS OF

CENTRAL STATE HOSPITAL

Date: May 15, 1990
Time: Approximately 1:45 P.M.

RE: Exzavious Gibson

Q.: (Phone ringing.)

A.: Hello.

Q.: Dr. Storms?

A.: Yea.

Q.: This is Dennis Mullis in Cochran, Georgia. How are you?

A.: I'm doing fine. How are you doing?

Q.: All right. I am the attorney for Exzavious Gibson.

A.: Yea.

Q.: I believe you remember him, don't you?

A..: Yea, I sure do.

Q.: O.k. I was reading your report to Judge West and had a few questions. Have you got some time to discuss it?

A.: Certainly.

Q.: One thing that you had lifted from him apparently that I was somewhat unaware of. Uh, you indicated that he had been in one institution or another for the majority of his life.

A.: Well, that's what it sounded like. I mean he is, you know, he's a kid that's been in a lot of trouble and

has it seems like essentially raised himself. Yea, Yea. I mean I'm not sure all the exact, which institutions they were. They're probably equivalent to YDCs and stuff like that.

Q.: Yea?

A.: Uh, but, yea, I mean he has not had a particularly wonderful upbringing.

Q.: Yea? Did you elicit any history of child abuse or anything of that nature?

A.: Na, I wasn't able to get that.

Q.: O.k. What sort of testing procedure did you follow?

A.: Well, actually we, well we did a, uh, an intelligence test to find out if he was retarded or not and he's not.

Q.: Did you have an I.Q. figure?

A.: Yea, it's somewhere in the 80's. Actually I can't remember. I think we did, probably did, I think we did an MMPI which was malingered because he wasn't trying too hard on it and we also had, did a neurological evaluation over at the Neurology Department which came back totally negative, so I didn't feel like there was anything, you known, [sic] there wasn't anything, anything physical.

Q.: Yea. What about as far as the personality test?

A.: Well, like I said it was malingered so I don't think the results were particularly valid.

Q.: I see. Do they still use the PAT [handwritten "T" over "P" in original] type of thing or is that antiquated?

A.: Yea, but I don't. I don't. I'd never go into Court with a PAT [handwritten "T" over "P" in original]. Na, I

don't do that. Uh, basically, uh, I got pretty much what I needed. I wanted to make sure that he was not, he was not mentally retarded first of all, and he is well out of that range. There is no question.

Q.: Even with an I.Q. in the 80's?

A.: Na, that's still average.

Q.: Yea?

A.: You know, I mean part of the reason. He probably. He's naturally a smart guy and he's naturally extremely street smart and he, um, would probably if he'd paid more attention in the school would of probably done better on that test cause that the waves are definitely, uh, you know, well, punishes. It, it's part of a, uh, academic in nature, you know, and he probably. I can't remember, he probably scored low on the general information, finding stuff. Uh, but he is a very, he's a very street smart kid.

Q.: Yea?

A.: Nothing particularly. There's nothing retarded about him at all.

Q.: Any, uh, any doubt as far as him having realization of what he's accused of and what he's

A.: None whatsoever.

Q.: Yea?

A.: None.

Q.: O.k. Did he express any concern about his situation?

A.: Not really. You know, I mean this kid, uh, this kid really didn't express much remorse, didn't express much, you know, basically out of apathy. I mean this is a kid that's been in trouble, you know, more or less, most of his life and, uh, I don't think it means much to him. I think he functions better inside, you know, a prison situation than outside.

Q.: Yea? Uh, you indicated that you felt like he was an escape risk?

A.: Yea, I do.

Q.: Dangerous? What was the reasoning for that?

A.: Well, I think just based on his past history, and I think the fact that, you know, that this kid is really. He likes it here. He doesn't like it down there for one thing and, uh, uh, he has not been a management problem to us in any way. He has, you know, at times appeared a little bit hostile, but we're pretty, we're use to that. He is not, you know. I know that he says that he tried. I guess he was in the Eastman City Jail, is that right?

Q.: Yea.

A.: He said he tried the escape because, uh, he wanted to move out to somewhere.

Q.: Yea?

A.: Out to the county jail, but, you know, I'm never, I would just treat him consciously. I would have the authorities treat him consciously, you know.

Q.: Yeah? O.k. Well, that's basically what I had to ask.

A.: I'm sorry actually. I'm glad I'm not having to defend this.

Q.: Well, you have to call them like you see them. I understand that.

A.: Yea.

Q.: O.k. All right. I appreciate it.

A.: O.k.

Q.: Thanks a lot. Bye.

Respondent's Exhibit 3

June 11, 1990

Mr. Wash W. Larsen, Jr.
Attorney at Law
P. O. Box 2002
Dublin, Georgia 31021

RE: Eason vs. State

Dear Wash:

Thank you very much for the copy of the brief in regard to the above and the subpoena form. The brief was as cogent as anything I have ever come across. I thought the argument on page 49 answers the "indpendent test" argument beautifully. You might want to expand on that a little. What you seem to be saying is that the Court of Appeals has shifted the burden of proof to the defendant to come forward with his own independent expert.

I would prefer that my client receive a life sentence, of course, but this may very well turn out to be the test case for the federal courts. Again, thanks.

Sincerely yours,

Dennis Mullis

DM/et

Respondent's Exhibit 4

[Envelope marked "TO THE POLICE"]

[hand-drawn or hand-traced comic strips depicting Snuffy Smith saying "WELL GLORY BE!! TELL ME ALL BOUT' IT!!" and depicting Andy Capp, running into a bar, saying, "DUNNO WHY - THERE'S NEVER ENOUGH TIME TO WAIT FOR AN ANSWER"]

[Original Handwritten]

To whom it may concern:

It was a magnificent escape, if I may be so modest to say so! Here is a monition for any would be pursuit. There is a certain peril in following me! Sorry if your superior chides you, don't feel penitent ___, ___ the _____ hope it _____ up to ___! It wasn't strenuous to escape because I had an inside subsidiary. Thank Roylee for kicking the paper clip in here. Hope your not sulking?! I am unaccompanied at the moment, I'm sure you would have loved an invitation. I could have left long ago but I decided to dawdle until the time was right to bad I had to eviscerate (myself) from the crime accused. This is a tourniquet isn't it? Adios for now my friend.

almost told on myself!

Sincerely yours,
HA!Ha!Ha!

Respondent's Exhibit 5

March 27, 1990

Mr. Exzavious Lee Gibson
Inmate, Dodge Co. Jail
Eastman, Georgia 31023

RE: *State vs. Exzavious Lee Gibson*

Dear Exzavious:

As I indicated to you in court on Monday, it is extremely important that you refrain from writing anything directly concerning your case or making any drawings. I must admit that you have some talent in this area, but this is something you are going to have to avoid for awhile. As I indicated to you, law enforcement will seize these and try to use them against you in a thousand different ways. There is no sense in worsening your situation. We will need all the help we can get and there is nothing to be gained by giving the other side any ammunition. Enough said about that.

I will see you at the arraignment on Tuesday afternoon and I will be glad to answer any questions which you might have at that time.

Sincerely yours,

Dennis Mullis

DM/jm

Respondent's Exhibit 6

[Original Handwritten, Misspellings In Original]

6/1/90

Dear Mr. Mullis,

I am writing you on behalf of my case. I have a few questions. First of all when do you think my trial will start? I don't mean June 11th when they pick the jury. I mean the actuell day of my appearance for trial. Also, I heard a few guys talking about how much time people could get and I was wondering. Let's say I did not get the death penalty could the judge sentence me to a maximum time lenth like say 25 years before I get a chance for parole. Did you get the results of the test I took here at the psychaitrist you sent. I understood someone to say a woman got 20 years for cutting up her husband and freezing him, is their any truth to that statement? Would you mind telling me your expectations as to the outcome of this case. I have one more question and then I will close. Are the people hear (Police) allowed to keep me from reading the paper when their is information concerning my case (over) [Indicating Letter Is Continued On Back Of Page] in that paper? Well that is all for now; thank you very much for being my representative, I am sure you are doing you best.

Sincerly yours,
Exzavious Gibson

/s/ Exzavious Gibson

P.S. Do you think you could fine some stamps for me?

Respondent's Exhibit 7

[Original Handwritten, Misspellings In Original]

DATE

INMATE'S NAME: STATE SERIAL NUMBER:
INSTITUTION: CITY:

Dear Dennis,

I would like you to send another one of those waiver forms because I have messed up my last one along with the envelope you enclosed. Coffee! My answer is, I don't want to appear. What do you think is best? Would it make a difference if I show up? Sorry I messed up the last one I would appreciate it if you could send another along with an answer to my question. Thank You.

Sincerly yours,

Exzavious Gibson

Respondent's Exhibit 8

[Original Handwritten, Misspellings In Original]

DATE

INMATE'S NAME: STATE SERIAL NUMBER:

INSTITUTION: CITY:

Dear Mr. Mullis,

I have talked to someone who has told me it may be wise to appear at my motion for new trial. Therefore I have changed my mind and decided to appear at this phase. I am sorry if I have inconveninced you in any way. Thank you.

Sincerly yours,

Exzavious Gibson

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON, Petitioner, v. TONY G. TURPIN, Warden, Respondent.	*	CASE NO. S97R1412 ON APPEAL FROM THE SUPERIOR COURT OF BUTTS COUNTY

RESPONSE TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

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Assistant Attorney General

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(404) 656-5734

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON,	*	
Petitioner,	*	CASE NO. S97R1412
v.	*	ON APPEAL FROM THE SUPERIOR COURT OF BUTTS COUNTY
TONY G. TURPIN, Warden,	*	
Respondent.	*	

RESPONSE TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

Comes now Tony G. Turpin, Warden, Respondent in the above-styled appeal from the denial of habeas corpus relief and files this his response to Petitioner's application for a certificate of probable cause to appeal, showing and stating as follows:

PART ONE

STATEMENT OF THE CASE

Petitioner, Exzavious Lee Gibson, was tried in the Superior Court of Dodge County on charges of malice murder and armed robbery. (Direct Appeal Record (hereinafter "D.R.") p. 1). Petitioner was represented pre-trial, at trial, and on appeal by attorney W. Dennis Mullis of Cochran, Georgia. The trial of Petitioner's case was conducted June 11 through 14, 1991. The jury found Petitioner guilty of malice murder and armed robbery. (D.R.

p. 1). Following the sentencing phase of trial, the jury found the existence of two statutory aggravating circumstances, and Petitioner was sentenced to death for malice murder. (D.R. p. 4, 5). Petitioner received a sentence of life imprisonment for armed robbery. (D.R. p. 7).

Petitioner's motion for new trial was denied on January 4, 1991. (D.R. p. 201). Petitioner appealed to this Court, which affirmed his convictions and sentences on June 10, 1991. *Gibson v. State*, 261 Ga. 313, 404 S.E.2d 781 (1991). The United States Supreme Court denied certiorari on February 24, 1992. *Gibson v. Georgia*, 502 U.S. 1101, 112 S.Ct. 1188 (1992) *reh. denied* 503 U.S. 999, 112 S.Ct. 1708 (1992).

On December 20, 1995, with no pending execution date, Petitioner filed a pro se state habeas corpus petition which had been prepared by the Georgia Appellate Practice and Resource Center (hereinafter the "Resource Center") on Petitioner's behalf. (R. 2, Attachment to Petition, p. 1). Respondent filed his answer and thereafter moved for entry of a scheduling order, advocating adoption by the habeas corpus court of the timelines promulgated by the Superior Court Judges Counsel, set forth in U.S.C.R. 44, and adopted by this Court on December 15, 1995, as contemplated by O.C.G.A. § 9-14-47.1(c), to govern first-time capital state habeas corpus petitions filed on or after January 1, 1996. While acknowledging the petition in the instant case was filed prior to January 1, 1996, Respondent suggested that the habeas corpus court excercise [sic] its inherent power to control the orderly progress of litigation pending before it by issuing a scheduling order adopting the timelines set forth in Rule 44. (R. 8). On February 8, 1996, stating its purpose to control the

orderly progress of litigation and facilitate a fair and orderly resolution of the issues, the habeas corpus court entered a scheduling order establishing deadlines for the filing of motions by the parties and for any amendments to the petition in accordance with the guidelines set forth in Uniform Superior Court Rule 44, (R. 9), guidelines which the Resource Center was well aware of when it filed the petition in this case. (*See, e.g.*, Petitioner's Application for Certificate of Probable Cause to Appeal (hereinafter "Application for CPC") p. 5, "The purpose of filing [December 20,] 1995 was to avoid the expedited procedures under Rule 44 that took effect for petitions filed on or after January 1, 1996.").

The Resource Center refused to enter an appearance on Petitioner's behalf in this case. Instead, during the months of February, March, April, May, June, July, and August of 1996, when it could have been preparing Petitioner's case for a hearing, the Resource Center filed six (6) separate motions as amicus curiae counsel seeking to postpone indefinitely the progress of Petitioner's case. The Resource Center cited as the basis for such a postponement the fact that Petitioner was not represented by counsel, a situation which Petitioner and the Resource Center themselves had contrived by the voluntary and unprompted filing of this petition. (R. 10, 15, 18, 21, 23, 24).

No amendments to the petition were filed, and the habeas corpus court scheduled an evidentiary hearing for August 22, 1996, (R. 19) and later rescheduled the hearing, at the oral request of the Resource Center during a telephone conference among the habeas corpus court, counsel for Respondent, and Ms. M. Elizabeth Wells, of

the Resource Center, to September 12, 1996 on the claims Petitioner raised in his original petition. (R. 27).

Ms. Wells of the Resource Center, who had been involved throughout the progress of this case as amicus curiae counsel, was present in the courtroom on September 12, 1997, and on several occasions during the proceedings addressed the Court on Petitioner's behalf. (T. 3-16, 28, 67-68). However, Ms. Wells steadfastly refused the habeas corpus court's entreaties to enter an appearance on Petitioner's behalf in the absence of a pre-appearance bargain for guaranteed additional time. (T. 3-16).

On March 11, 1997, the habeas corpus court entered an order denying Petitioner habeas corpus relief. On March 20, 1997, Petitioner filed his Notice of Appeal in the Superior Court of Butts County. On March 20, 1997, the law firm of King & Spalding entered its appearance in this Court on Petitioner's behalf and, following an extension of time, on May 27, 1997 filed Petitioner's Application for CPC.

This response is filed in response to said Application for CPC.

PART TWO

STATEMENT OF FACTS

The facts of Petitioner's case, as found by this Court in its opinion on direct appeal, are as follows:

> The victim operated a family-owned grocery store in Eastman. Late in the afternoon of February 2, 1990, Eastman's chief of police, driving by the store during a routine patrol, saw a crowd at

the front entrance. A man ran to the chief's car and reported there was blood all over the store and no one visible inside. The chief radioed for assistance and then approached the store. The main entrance was locked. A member of the victim's family broke open a side door. The police chief entered the store and discovered the victim's body "behind the counter and blood just totally everywhere."

A man had been seen running away from the store. One of the women in the crowd recognized him and knew where [sic] lived. She accompanied a police officer to the defendant's home. Leaving her in the car, the police officer went to the door, knocked, and asked permission to enter. A woman answered, telling the officer to come in. He opened the door and immediately noticed drops of fresh blood on the floor in the living room. The officer asked the woman if anyone had run into the house. She answered "her grandson" and directed him to a bedroom down the hall. The officer went to the bedroom. Looking from the doorway, he saw bloody money under the bed. The officer went to the bed and looked under it, thinking the defendant might be hiding there, and saw the rest of the money (almost $500) and a wallet. He looked inside the wallet and determined that it belonged to the victim. Looking around, he saw some bloody clothes near a closet which fit the description of the clothing worn by the man seen running away from the store. The officer opened the closet door and found the defendant, "crouched down" and sweating profusely. He was arrested and taken to jail.

An autopsy was conducted on the body of the victim. He had been cut numerous times; some of the cuts were very deep while others were shallow. The autopsist testified that he found 39 "stab and slash and superficial cut wounds on [the victim's] body." The knife blade had broken off in the vertebrae of the victim's neck, severing the victim's spinal cord and immediately paralyzing him from the neck down. In the autopsist's opinion, many of the superficial wounds in the front of the victim's chest and neck were inflicted by what was left of the knife after it had broken in the victim's neck.

The defendant confessed shortly after he was arrested. He first gave a written statement in which he acknowledged killing the victim, claiming he needed money for drugs. Later that evening, he gave a longer tape-recorded statement, in which he added that he had been in the store earlier that day and had used profanity in the presence of the victim, who had then lectured him about his behavior. The defendant stated that when he returned later, he intended not only to rob the victim but also "to hurt him" because "I didn't like him."

Gibson, 261 Ga. at 313-314.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

THE HABEAS CORPUS COURT PROPERLY DISPOSED OF THE CASE BELOW APPLYING WELL-ESTABLISHED PRECEDENT.

A. THE FINDINGS AND CONCLUSIONS OF THE HABEAS CORPUS COURT ARE LEGALLY CORRECT AND SUPPORTED BY THE RECORD, AND THERE IS NO BASIS FOR AUTHORIZING A REMAND.

The record in this case confirms that the habeas corpus court correctly applied established habeas corpus principles and established legal precedent on the issues of effectiveness of counsel, prosecutorial misconduct, and the constitutionality of the Unified Appeal Procedure in denying relief in Petitioner's case. There is no arguable merit to the claim that the habeas corpus court's findings of fact were clearly erroneous and its conclusions of law were contrary to and an unreasonable application of clearly established state and federal law.

The record in this case is sufficient to resolve Petitioner's habeas corpus claims and supports the denial of habeas corpus relief. Petitioner's failure to present evidence to support his habeas corpus claims, allegedly because of his lack of counsel, does not authorize a remand of this case since, as discussed below, Petitioner voluntarily filed this case pro se.

B. THE HABEAS CORPUS COURT PROPERLY APPLIED THE DIRECTIVES OF THIS COURT IN *DAVIS V. THOMAS* TO THE FACTS OF THIS CASE.

This case exemplifies the proper and appropriate exercise by a habeas corpus court of its "broad discretion" to control its calendar by refusing a request for continuance prompted by "unpreparedness [and] the lack of due diligence." This case therefore presents no basis for the granting of a Certificate of Probable Cause to Appeal.

This Court confirmed that very discretion during the pendancy of Petitioner's case in the habeas corpus court below in the context of an interlocutory appeal in a capital state habeas corpus case. In *Davis v. Thomas*, 266 Ga. 835, 471 S.E.2d 202 (1996), this Court recognized the "broad discretion" of the habeas corpus court to manage its court calendar, acknowledged the absence of a right to appointment of counsel in a habeas corpus proceeding, and cautioned that a habeas corpus court would act properly in refusing a request for continuance prompted by unpreparedness or lack of due diligence.

In Petitioner's case, the habeas corpus court was faced with just such "unpreparedness" and "lack of due diligence" when, in the absence of any execution date or other prompting by the State, Petitioner and the Resource Center filed a capital state habeas corpus petition on December 20, 1995. The filing of this petition constituted an undisguised attempt to thwart the efforts of the General Assembly, the Council of Superior Court Judges, and this Court to ensure, through the enactment of O.C.G.A.

§ 9-14-47.1 and the promulgation and adoption of Uniform Superior Court Rule 44, (hereinafter "USCR 44"), that "the writ of habeas corpus in state courts [ ] not be used by defendants upon whom the death penalty has been imposed solely as a delaying tactic under the guise of asserting rights, seeking remedies, or raising objections and challenges to their convictions and sentences." (Ga. L. 1995, p. 381 § 2).[1]

Petitioner and the Resource Center voluntarily filed the December 20, 1995 pro se petition in this case for the admitted purpose of avoiding the time limits of USCR 44 and were therefore obviously aware of those new time guidelines before the decision to file the petition. In light of the transparent manuevering and gamesmanship by the Resource Center in filing eleven (11) "pro se" petitions in one day just before the official implementation date of USCR 44, the fact that Respondent would attempt to ensure that the newly-filed petitions would be litigated under the same time schedule as set forth in USCR 44 and without undue delay could not have come as a surprise to the Resource Center.[2]

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[1] In fact, in its desire to avoid any statutes or court rules which might hamper its ability to delay the progress of death penalty cases in Georgia, the Resource Center filed habeas corpus petitions on December 20, 1995 in two cases in which the convictions were not even yet final and the consideration of which was therefore clearly and indisputably premature under established habeas corpus law. (*Crowe v. Thomas*, Butts Co. Case No. 95-V-655, and *McMichen v. Thomas*, Butts Co. Case No. 95-V-653).

[2] Petitioner and the Resource Center were given formal notice, through Respondent's February 5, 1996 Motion for Entry of Scheduling Order, that Respondent was seeking such a schedule.

If the true intent of the Resource Center was to ensure that Petitioner was represented by counsel in his state habeas corpus proceedings, the Resource Center would not have filed a pro se petition in Petitioner's case on December 20, 1995.

Likewise, there is no justification for the demands below that the petition not go forward as long as the petitioner is pro se where the petition was deliberately filed pro se. Having initiated this action and set in motion the working of the judicial system, Petitioner and the Resource Center had no justifiable expectation that the petition they filed would not then proceed. Petitioner and the Resource Center certainly had no right to expect that they were entitled to delay indefinitely the progress of Petitioner's case and utilize the habeas corpus court as the unwitting vehicle of such improper delay.

Moreover, if its true intent was to ensure that Petitioner was represented by counsel, the Resource Center was fully capable of entering an appearance of Petitioner's behalf. Petitioner's conviction had been final for over three (3) years at the time his habeas corpus petition was filed. As counsel for Respondent in all of the capital state habeas corpus cases, counsel for Respondent here states upon information and belief that the Resource Center, at the time of Petitioner's habeas corpus hearing, was sole counsel in only ten (10) capital state habeas corpus cases and that in the time period from January 1994 through the date of Petitioner's September 12, 1996 evidentiary hearing in this case, the Resource Center was sole counsel in only one (1) state habeas corpus evidentiary hearing.

If its true intent was to ensure that Petitioner was represented by counsel, the choice of the Resource Center in this case to concentrate its efforts, from December 20, 1995 until September 12, 1996, on filing amicus curiae motions for indefinite continuances instead of substantively preparing to litigate Petitioner's case is inexplicable.

If its true intent was to ensure that Petitioner was represented by counsel, the Resource Center could have entered an appearance as counsel in Petitioner's case and thereafter sought additional time to prepare Petitioner's case. Another attorney at the Resource Center, Stephen C. Bayliss, in fact undertook just such a course in *Lynd v. Turpin*, Case No. 95-V-646, another of the "pro se" petitions filed December 20, 1995. Mr. Bayliss entered an appearance as counsel, not amicus curiae counsel, for the petitioner in that case just one month before that case was scheduled for its evidentiary hearing. He entered his appearance with the filing of a motion for extension of time; however, he did not at the time he entered that appearance have any assurances from the habeas corpus court in that case that his motion for extension of time would be granted.

The habeas corpus court in Petitioner's case invited Ms. Wells of the Resource Center to make a similar entry of appearance on Petitioner's behalf at which point, the court assured Ms. Wells, it would reconsider the Resource Center's motion in the case for additional time. The following colloquy then ensued:

> THE COURT: Just a minute, please. Just a minute. Would you like to represent Mr. Gibson?

MS. WELLS: Your Honor. Your Honor is –

THE COURT: Just answer –

MS. WELLS: I'm answering your question.

THE COURT: Just answer yes or no.

MS. WELLS: If you will give us time, the answer is yes.

THE COURT: Do you want to make an appearance for Mr. Gibson?

MS. WELLS: Your Honor –

THE COURT: Let me tell what's wrong with what you have done.

MS. WELLS: I recognize –

THE COURT: You know, I've been on vacation. I think Ms. Whitaker has been on vacation. You've been on vacation. Mr. Gibson has been in jail. You have had ample opportunity to do anything you wanted to do in this case and have failed to do that. Now, I am not so sure that you are – are you capable of representing him, if you handle it the way you have handled it so far.

MS. WELLS: Your Honor.

THE COURT: I have some great concern about that.

MS. WELLS: With our caseload, we are presently not capable of representing Mr. Gibson.

THE COURT: Well, then –

MS. WELLS: We would do it in a heart beat, if we could.

THE COURT: You've had four years to do it.

MS. WELLS: Your Honor, we have requested, over and over and over, to be heard on this and Your Honor has not granted us even an opportunity to be heard on this.

THE COURT: I've read all of your – what are you going to tell me different than is in your pleadings?

MS. WELLS: Your Honor, I'm going to try to make you see that this is – that nobody has ever proceeded in a modern death penalty in Georgia without counsel.

THE COURT: I understand that.

MS. WELLS: That this is ridiculous. That Mr. Gibson has a right –

THE COURT: Why didn't you –

MS. WELLS: – to a writ of habeas corpus.

THE COURT: You've had four years to represent him. Why didn't you get in here and represent him?

MS. WELLS: We have not had four years to represent him. That's just absolutely ludicrous, Your Honor. That's certainly – and the records will support that.

THE COURT: You've been in this case. You've had time to go to Europe, haven't you?

MS. WELLS: Absolutely, Your Honor, and –

THE COURT: And yet you didn't have time to represent Mr. Gibson.

MS. WELLS: I don't think those two weeks would have made a difference in whether or not Mr. Gibson's case was properly prepared.

THE COURT: That's –

MS. WELLS: I've worked on this – if you want to talk about my personal life –

THE COURT: No, I don't want to talk about it, I'm just saying –

MS. WELLS: You apparently do.

THE COURT: I think if you would have put the time on the case maybe you could have represented him, but I have some serious concern that if you think it is more important to do that than to take up this case, whether you could adequately represent him or not.

MS. WELLS: I have worked fourteen hours days for the last two weeks. I have worked almost every weekend since last September, 1995. This is ludicrous to find that because I went to England for two weeks I an waiving Mr. Gibson's right to an attorney.

THE COURT: No, all I'm saying –

MS. WELLS: He –

THE COURT: All I am saying to you, is that if it is so important for him to have – that you can't – for you to get him a lawyer, why didn't you stay here and try to do that?

MS. WELLS: Your Honor, I have attorneys. I have told the Court there are attorneys lined up who will take Mr. Gibson's case if Your Honor will allow him an opportunity to meet with Your Honor and discuss a Scheduling Order prior to the entry of appearance. These attorneys cannot afford to enter an appearance and be ordered to file something within a month.

THE COURT: What does the State want to tell me?

MS. WHITAKER: Your Honor, I would add that under the Uniform Superior Court Rule adopted by the Georgia Supreme Court in January of this year and passed in December of this year, in (sic) which the Respondent again believes, was what prompted the filing of this petition in the first place. The time lines provided are that an evidentiary hearing should be held within six months of the filing of the petition. The petition was filed in December of 1995, and as the Court is aware, it has already been nine months, so any, any protestations from the Resource Center that they have not had sufficient time given the case was final in 1992, we believe are inaccuracies at this point.

MS. WELLS: Your Honor, as the State has conceded, this was filed prior to the Rule 44. It's not – Rule 44 does not dictate the scheduling guidelines in this case. The Georgia Constitution allows Mr. Gibson the writ of habeas corpus, a guaranteed –

THE COURT: Please, Ms. Wells. Ms. Wells. Don't repeat anything you've already told me in all of these briefs you've filed. Okay? I mean, I've read them all. I've been through it.

MS. WELLS: Your Honor, this is a complete denial of due process. This is making a mockery of the system.

THE COURT: You've argued that point. You've argued that point.

MS. WELLS: Your Honor, I submit if you would have allowed the hearing back when we

filed the first Amicus motion, we may be proceeding on this. We cannot – we are understaffed. We have two attorneys at the Georgia Resource Center who can enter into State Court.

THE COURT: Well, the record reflects what times have been spent doing what. It reflects the time that the petition has been filed; how long everything has been pending. Ms. Wells, in all due respect, the thing has had adequate time to be thoroughly investigated and reviewed, if you wanted to do that.

MS. WELLS: Your Honor, that is simply not true.

THE COURT: With all due respect.

MS. WELLS: That is simply not true.

THE COURT: Well, then what do you think is a good time – years?

MS. WELLS: No, Your Honor. I will tell you what. Various courts – there were thirteen pro se petitions – there were thirteen inmates proceeding pro se in January of this year. Various courts have allowed counsel on them. They have had scheduling orders. One Judge allowed nine months; one Judge allowed six months. The Resource Center has been willing to meet with these Courts to attempt to find counsel or to enter an appearance. We have repeatedly told the Court that that's our desire to do so in Mr. Gibson's case. We don't think that the system benefits by having this inmate go through without counsel. We think that it makes a mockery of the system. We –

THE COURT: Didn't I ask you yesterday, didn't I ask you yesterday on the telephone, did you want to represent him?

MS. WELLS: Your Honor, I have told you –

THE COURT: And what did you tell me?

MS. WELLS: – we will represent him with time.

THE COURT: Yes.

MS. WELLS: I said with adequate time.

THE COURT: Well, let me ask you this, did I ask you that back when you first filed your Amicus brief, did you want to represent him?

MS. WELLS: No, Your Honor.

THE COURT: What did you tell me then?

MS. WELLS: No, Your Honor, you did not tell me that.

THE COURT: Well, what have you told me in your briefs?

MS. WELLS: Well, I have asked – I have requested time so we can come on to represent this client. I have requested repeatedly that we be allowed time to represent this inmate adequately. We are bound by ethical rules to competently represent someone.

THE COURT: Do you want to step up here and have a seat next to him as his lawyer?

MS. WELLS: Your Honor, if you will give time. I mean it is ludicrous to expect a hearing to go forth.

THE COURT: Ms. Wells. Ms. Wells.

MS. WELLS: I haven't read the record in this case. I know nothing about this case.

THE COURT: Ms. Wells. Ms. Wells.

MS. WELLS: Yes, Your Honor.

THE COURT: Do you want to represent him? I am not going to tell you what I am going to do, but if you want to represent him, sit down in the chair, make an appearance in this Court or please be seated.

MS. WELLS: Your Honor, you know I want to represent him I have said it every way I can say it. To sit down here and have the Court say, conduct the hearing when I have never spoken with Mr. Mullis, I have never read the record. I know nothing about this case. That would make a mockery of it. Your Honor, I think –

THE COURT: You have filed a lot of papers not to have read the file.

MS. WELLS: Those papers do nothing but recite the history of the death penalty and what's going on and what our attempts are to find counsel.

THE COURT: I will give you the opportunity right now to have a seat with him as his lawyer or please sit down.

MS. WELLS: Your Honor, I, just to put on the record that I would like to enter an appearance, but I cannot do so without the Court discussing what the scheduling limitations are going to be.

THE COURT: I am not going to make any deals, Ms. Wells. If you want to represent him, have a seat. If not, sit down.

MS. WELLS: Well, Your Honor, this is a complete denial of Mr. Gibson's rights.

THE COURT: Come up here and help him.

MS. WELLS: Help him what? Help this Court deny him all of his rights?

THE COURT: Don't sit – all you have done is sit outside the bar and throw stones.

MS. WELLS: Your Honor –

THE COURT: Get inside the bar and do something.

MS. WELLS: Your Honor, the record will show that we have entered appearances on a number of cases; that we have found counsel on a number of cases.

THE COURT: Well, I am not in those cases, Ms. Wells, and all I have gotten is stones thrown, and all I am saying is either come here and represent him, you are welcome [sic] come and sit down and represent him, and we will proceed and I will listen to your motions, and I am not going to tell you how I am going to rule on them. I am not going to predecide the case. But if you want to represent him, have a seat. If not, please sit down, and let me go forward.

MS. WELLS: Your Honor, I don't understand why we can't just discuss what a scheduling order would be prior to that. I certainly have no confidence that we won't have to proceed with the hearing today. I can't enter –

THE COURT: Well, let me ask you this –

MS. WELLS: I cannot competently –

THE COURT: If I sit down and discuss the scheduling order and you don't like it then, you ain't going to do anything so, I mean, if you want to represent him, I'll say it again, have a seat next to him, make an appearance or, please, let me go forward.

MS. WELLS: Your Honor, this is a mockery of justice.

THE COURT: You have told me that.

MS. WELLS: Yes, Your Honor, well, I just don't think you are aware of that.

THE COURT: I am very aware of what –

MS. WELLS: This is ridiculous. Mr. Gibson may as well be hung from a tree out back. This is just ridiculous.

THE COURT: I judge you are not going to represent him, is that correct?

MS. WELLS: Your Honor, I will enter an entry of appearance if Your Honor will discuss a scheduling order. I simply cannot do it.

THE COURT: I am not going to take –

MS. WELLS: I mean, I am supposed to be in another court.

THE COURT: It would not be fair. It would not be fair to Mr. Gibson to have your (sic) make a conditional appearance with him. If this man needs a lawyer, if you think he needs a lawyer, be his lawyer. If you don't, don't, don't say, I am only going to represent him. If he needs a lawyer so bad, don't tell him you are going to represent him only if he does certain things, only if the Courts do certain things. It is not fair to him. Either get in the case or get out.

MS. WELLS: Your Honor, it is not fair to him to come on a case and not be given an opportunity to investigate and present his issues.

THE COURT: It is better than to have some lawyer get in the case and then turn around and desert him, because they don't get what they want.

MS. WELLS: Your Honor, I am not talking about turning around and deserting him. I am talking about not coming on the case until we discuss whether or not there is adequate time to investigate and present this case.

THE COURT: I understand your position, and I will again offer you the opportunity to come up here and represent him or please have a seat and let me proceed.

MS. WELLS: Well, Your Honor, I would respectfully submit that that is an empty offer.

THE COURT: Okay. Thank you. Okay. Anything else on behalf of Mr. Gibson. Anything else Mr. Gibson wants to tell me after that conversation?

MR. GIBSON: No, sir.

9/12/96 T. 5-16.

As the foregoing and an examination of the record in this case and the transcript of the entire hearing, including Petitioner's statements to the court therein, clearly establishes, the habeas corpus court acted well within the proper exercise of its discretion in proceeding with the habeas corpus evidentiary hearing. A close review of the habeas corpus court's conduct of this matter demonstrates his appropriate concern for the Petitioner and his

pro se status and his willingness, even at the last minute, to entertain a reasonable solution under the circumstances.

Unless the court was willing to abdicate its control over the progress of the proceeedings [sic] to Petitioner and the Resource Center, the court was left with no viable alternative to proceeding with the evidentiary hearing. In a proper exercise of his judicial authority, the habeas corpus court repeatedly offered the Resource Center the opportunity to enter an appearance, at which point all of their motions for additional time would be considered anew as being offered by counsel for Petitioner. The only action which the habeas corpus court refused to take, as was reasonable, was to predecide the motions before counsel entered an appearance. (9/12/96 T. 13). Given the Resource Center's insistence that the court predecide the motions before it would agree to enter an appearance, the court's only option, other than to capitulate, was to proceed.

This case presents no basis for the granting of this Application for Certificate of Probable Cause. The habeas corpus court in this case followed the clear directives of this Court in *Davis v. Thomas*, issued during the pendancy of Petitioner's case, confirming that there is no right to counsel in a capital state habeas corpus case and that the habeas corpus court retains "broad discretion" to control the progress of capital state habeas corpus cases pending before it. In proceeding with the evidentiary hearing in this case, the habeas corpus court applied this Court's instruction that it would be a proper exercise of the habeas corpus court's discretion to deny requests for

continuances prompted by unpreparedness or the lack of due diligence.

The effect of this Court's granting of this Application for CPC in the factual context of this case would be to send a clear message to all habeas corpus courts and capital litigants that, despite the plain language of *Davis*, the habeas corpus courts in fact have no discretion and must relinquish all control over the progress of post-conviction capital litigation to capital litigants and grant continuances as a matter of course to the Resource Center or any capital post-conviction petitioner.

Given this Court's recent affirmation in its adoption of USCR 44 of the need to eliminate unwarranted delay in capital post-conviction proceedings, the granting of this application would undermine the efficacy of USCR 44 and have the unintended result of promoting, rather than minimizing delay.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Respondent respectfully requests that this Court deny this Application for Certificate of Probable Cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States mail, properly addressed upon:

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